DOCUMENT RESUME

ED 227 626 EC 151 075

AUTHOR	Pullin, Diana
TITLE	Special Education: A Manual for Advocates. Volume I.
INSTITUTION	Harvard Univ., Cambridge, Mass. Center for Law and Education.
SPONS AGENCY	Legal Services Corp., Washington, D.C.
PUB DATE	Jun 82
NOTE	457p.; For a related document, see EC 151 076.
AVAILABLE FROM	Center for Law and Education, Inc. Gutman Library, 6 Appian Way, Cambridge, MA 02138 ($25.00 for 2 volumes, $2.50 postage).
PUB TYPE	Guides - Non-Classroom Use (055) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01/PC19 Plus Postage.
DESCRIPTORS	*Child Advocacy; Compliance (Legal); *Disabilities; Elementary Secondary Education; *Federal Legislation; Individualized Education Programs; *Special Education; Student Evaluation; Student Placement

ABSTRACT

The volume is designed to help attorneys, paralegals, and other interested persons to act as advocates for handicapped children. The first chapter provides an overview of federal laws concerning the education of the handicapped (including provisions in the constitution). Chapter 2 lists characteristics and needs of mental retardation, hearing impairments, speech impairments, specific learning disabilities, visual impairment, emotional disturbances, health impairments, orthopedic or physical impairments, multiple handicapping conditions, and developmental disabilities. Chapter 3 focuses on educational evaluation, including sections on procedural protections, student information, specific types of tests, and bias in evaluation. Placement and programming aspects, such as individualized education programs, least restrictive environment, and related services are considered in chapter 4. A final chapter details administrative hearings and appeals. Case summaries on such topics as damages/immunity, residence, priorities, and timelines for service are included in the extensive appendixes along with Federal Statutes and regulations concerning handicapped children. (CL)

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SPECIAL EDUCATION:

A Manual for Advocates

Volume I

Diana Pullin

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Cover Design: LineWork
Cover Photographs: Massachusetts Easter Seal Society and Caroline Saltonstall

FOREWORD

This volume is one of a series of twenty-six legal services practice manuals published by the Legal Services Corporation. The manuals are designed to be desk references for attorneys, paralegals, and other advocates for low income people.

The manuals will give readers an understanding of legal issues and practical tips on how to make the law work for their clients. They will thus be a valuable starting point for research. Although they are written to be as inclusive, insightful, and accurate as possible, the manuals will not be a substitute for individual, more extensive research. State or local laws may impact on the topics covered, and material must be updated through readers' own efforts.

There are currently no formal plans for updating the manuals. Various authors may update their volumes periodically, or the Legal Services Corporation may develop an updating system for the entire series.

The twenty-six volumes of this series are divided into five groups by subject area. Each manual's cover color (with exceptions noted) indicates its grouping. The manuals and their publication dates are as follows:

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Each manual is being sent at time of publication to each main and branch office of each Legal Services Corporation grantee. A limited supply of additional copies may be available for purchase from the volume's author or from the National Clearinghouse for Legal Services. All volumes will be available by mid-summer 1982.

Manual authors welcome comments and suggestions about their manuals. Please direct letters about this volume to the address on its title page.

June 1982

ACKNOWLEDGEMENTS

The principal author expresses her gratitude to the following individuals, without whom this volume would not have become a reality. The Advisory Committee for this manual, composed of Dr. Lannie LaGear, Bruce Kaplan, Steve Kubick, Paula Mackin, Margaret Moriarty, and Anna Bryant Motter, offered invaluable suggestions about format, content, and style. Lannie LaGear, Dr. Blair Glennon, Margo Haist, and Kathleen Boundy initially drafted sections of the text. Colleagues at the Center for Law and Education, particularly Sharon Schumack and Judith Ross, assisted on various substantive and administrative details. Finally, Kathryn Goodwyn displayed limitless patience in typing and retyping manuscripts and charts.

Publication of this manual was arranged by the Publications and Editorial Group, directed by Janelle Blanchard. Thomas Clancy, Madeleine Clark, Walter Moore, and Charlotte Moser edited various portions of the manual.

Introduction

This manual is primarily designed to serve as a practical guide for advocates for students in need of special education and their parents. Concerned educators may also find this volume useful. The material included here should be useful to both the inexperienced advocate and to those with more experience in advocacy but little familiarity with education practices. The manual is designed to provide an introduction to the federal laws and regulations relating to special education. In addition, a substantial portion of the book provides guidance on educational evaluation procedures and on techniques for determining whether a student has been appropriately evaluated by the school, has been placed in an education program that will meet the student's individual needs, or is making adequate progress in school. The manual explains and defines educational and psychological techniques and terminology. The manual defines the administrative and judicial remedies available for students, parents, or educators who are dissatisfied with how the educational process is functioning.

A major portion of this manual is devoted to a compilation of relevant federal statutes and regulations concerning education of the handicapped. This is the most comprehensive compilation of this body of law available in one volume. Many advocates will find that this manual provides a complete basic library on special education. Note, however, that the manual does not include state statutes or regulations concerning education of the handicapped. While many states have provisions which parallel the federal provisions, no state has provisions that are identical to the federal law. Some states offer more, some less, protections than the federal law does, with the degree of protection frequently differing depending upon the subject matter involved.

The chapters of this book do not include a discussion of case law concerning special education other than the few landmark cases that led to the federal law and regulations discussed here. The case law concerning education of the handicapped is developing so rapidly that the book would have been out of date before it was printed. The appendices, however, include summaries of cases; these summaries will be updated periodically or can be supplemented by referring to the *Education Law Bulletin* (available from the Center for Law and Education, Inc., 6 Appian Way, Cambridge, MA 02138) or the *Education of the Handicapped Law Report* (CRR Publishing Company, Washington, D.C.). Readers are urged to consult the case summaries in Appendix A in conjunction with their review of the text and of the statutes and regulations. The case summaries are arranged topically and cross-referenced to facilitate this process.

Finally, at the end of Chapter 3 is a chart that briefly describes the tests and evaluation techniques that are commonly used in conducting educational evaluations. These charts are designed to assist those who are unfamiliar with educational testing so that they might know the purposes for which tests are used as well as how they are misused.

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CHAPTER 1

OVERVIEW OF FEDERAL LAWS CONCERNING EDUCATION OF THE HANDICAPPED

1.1 INTRODUCTION

The United States Government Accounting Office (GAO) reports that 4.2 million handicapped students nationwide received special education during the 1980-81 school year. These children comprised almost 8.5% of the total school-age population of students between 5 and 17 years of age.[1] The GAO data also indicate that there are few handicapped children in need of special education who are unserved, or not receiving any education at all, but there are many students who are in school and who need special education but are not receiving it. These "underserved" students are prevalent among those in the preschool, secondary, and postsecondary years and are common among students who are migrants and among those who suffer emotional disabilities.[2]

Issues concerning education of the handicapped, and the miseducation of students wrongfully labeled as handicapped, are the education law matters most frequently handled by legal services attorneys and advocates. Advocates representing students and parents on special education matters will quickly find that the problems of the handicapped are not only numerous, but diverse.

The problems of handicapped students vary from subtle discrimination in the provision of instruction to blatant discrimination in treatment. In the past, many handicapped students were barred from school attendance or any other institutional services. Now, almost all of these students are enrolled in some kind of program. The issues currently being addressed by advocates involve the quality and extent of the educational programs provided the handicapped. These issues concern the appropriateness of programs and services provided. Advocates have confronted issues ranging from whether a school should provide instruction in typing for an elementary student with progressive loss of sight to controversies over whether severely retarded students can benefit at all from any educational program. Many severely impaired youth now receive institutional care but do not receive appropriate educational services. Other students, who suffer only mild impairments, are the victims of misdiagnosis of their needs and of programs which do not provide necessary services.

As handicapped students become more integrated into the schools and the rest of society, new forms of discrimination become apparent. Wheelchair-bound students confront problems in obtaining physical access to all parts of a school building. Physically- or health-impaired students are disciplined for actions over which they have no control, such as the student with cerebral palsy who lost control over his facial muscles and was berated by his teacher for smiling continuously.

There are numerous problems which will be confronted by advocates representing parents and students on special education matters. Fortunately, federal and state laws provide tools for successfully addressing most special education issues.

This volume will focus primarily on two federal statutes concerning education of the handicapped. The Education for All Handicapped Children Act, Public Law No. 94-142,[3] provides federal aid to states and local school districts to assist them in providing special education; it also guarantees handicapped students a right to education. The second federal statute, Section 504 of the Rehabilitation Act,[4] is a general civil rights statute prohibiting discrimination against the handicapped by any program receiving federal assistance. This manual will not attempt to address, even in a general manner, the provisions of various state statutes and regulations. Each state has a statute or series of statutes concerning special education. If a state receives federal aid for special education,[5] the state is required to ensure that federal mandates concerning education of the handicapped are met by all educational agencies in the state.[6] By implication, such an assurance would require that state statutes and regulations be consistent with the federal requirements. However, the federal government has frequently approved state plans for compliance with federal law and has paid federal special education aid to states where very clear conflicts between state and federal law existed. Great ambiguity in the match between federal and state requirements also exists. Finally, some state laws give greater benefits to students involved in the special education process than federal laws do. Every advocate should become thoroughly familiar with state law so that it may be used in addition to the federal legal concepts discussed here.

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[1] Comptroller General of the United States, Disparities Still Exist in Who Gets Special Education 21 (Sept. 30, 1981) [hereinafter cited as GAO Report].

[2] *Id.* at 44.

[3] 20 U.S.C. §§ 1401-1416.

[4] 29 U.S.C. § 794.

[5] Federal aid for the education of handicapped children is currently available under several statutes. Most federal funding is provided under Pub. L. No. 94-142. At this time, only the state of New Mexico has declined federal funds under Pub. L. No. 94-142. In addition to Pub. L. No. 94-142, federal aid to special education is available under Title I of the Elementary and Secondary Education Act, Pub. L. No. 89-313, 20 U.S.C. § 241c-1. *See* § 1.5 *infra*. Also, under the Vocational Education Amendments of 1968, Pub. L. No. 90-576, 20 U.S.C. § 2310, 10% of available funds must be set aside for the handicapped. The Economic Opportunity Act Amendments of 1972, Pub. L. No. 92-424, 42 U.S.C. § 2928 mandate that 10% of all student enrollment in Head Start programs be set aside for handicapped preschoolers. *See* § 4.11.1 *infra*.

[6] 20 U.S.C. §§ 1412, 1413; 34 C.F.R. §§ 300.2, .360, .600-.653. Note that the regulations under Pub. L. No. 94-142 and Section 504 were previously codified at 45 C.F.R. Parts 121a and 84. *See* 45 Fed. Reg. 77,368 (1980). This manual will use the new citations.

Since 1971, the federal government has provided grants to states under Part B of the Education of the Handicapped Act, Public Law No. 93-380,[7] to assist state and local school districts in initiating, expanding, and improving special education programs for children. In 1974, federal involvement in funding of special education programs expanded considerably when authorization for funding under Part B was increased for fiscal year 1975 so that the states could "identify, locate, and evaluate all handicapped children, establish a policy of providing full educational opportunities for all handicapped children, and . . . establish a timetable" for accomplishing federal goals.[8] Part B also provided for procedural due process protections and assurances of confidentiality for handicapped children. The 1974 legislation incorporated many of the themes set forth in earlier landmark litigation, particularly *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*[9] and *Mills v. Board of Education of the District of Columbia*.[10]

It is important to remember that there are sound constitutional bases for the federal legislation and regulations concerning the education of the handicapped.[11] The *PARC* and *Mills* decisions were based exclusively on federal constitutional claims. Even after the implementation of the federal statutes, state[12] and federal[13] constitutional challenges have

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[7] 20 U.S.C. §§ 1411-1420 (1974) (amended 1975).

[8] [1975] U.S. CODE CONG. & AD. NEWS 1425, 1429-30.

[9] 334 F. Supp. 257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972).

[10] 348 F. Supp. 866 (D.D.C. 1972).

[11] *See* McClung, *The Legal Rights of Handicapped School Children*, 54 EDUCATIONAL HORIZONS 25 (1975); Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 CAL. L. REV. 40 (1974); McClung, *Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?*, 8 JOURNAL OF LAW AND EDUCATION 153 (1974); McClung, *The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavioral Problems?*, 13 JOURNAL OF LAW AND EDUCATION 491 (1974); L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CARE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN (1973); McClung, *School Classification: Some Legal Approaches to Labels*, 14 INEQUALITY IN EDUCATION 17 (1973); Ireland & Dimond, *Drugs and Hyperactivity: Process is Due*, 8 INEQUALITY IN EDUCATION 19 (1971).

[12] State constitutions have been found to be a source of educational rights of handicapped children. *See, e.g.*, Denver Ass'n of Retarded Children, Inc. v. School Dist. No. 1 of Denver, 535 P.2d 200 (Colo. 1975) (if school district maintains free kindergartens for normal children, it must also finance kindergartens for handicapped); Elliott v. Board of Educ., Appeal No. 63,062 (Ill. App. Ct. Sept. 13, 1978) (history of art. X § 1 of Illinois Constitution reveals that special education system is integral part of educational system and no discretion is left with legislature to deny this system to the public or to require any Illinois resident to pay for system through secondary level except by taxation or by fees for items not included within concept of tuition), Maryland Ass'n for Retarded Children v. Maryland Equity, No. 182-77676 (Cir. Ct. Baltimore, Md., Apr. 9, 1974) (pursuant to Maryland law, state and local education authorities are required to provide free appropriate education to all persons between ages of 5 and 20, including mentally retarded children, regardless of how severely or profoundly retarded they may be); Allen v. McDonough, Super. Ct. No. 14,948, Clearinghouse No. 18,634 (Suffolk County, Mass., Oct. 11, 1977) (compensatory services shall be made available to handicapped pupils denied court ordered entitlements to education for more than 60 days); *In re* "A" Family, 602 P.2d 157, 3 EDUC. OF THE HANDICAPPED L. REP. 551:345 (Mont. 1979) (when least restrictive environment for child is residential placement, child has right to such placement at no cost to parents); *In re* Richard K., 3 EDUC. OF THE HANDICAPPED L. REP. 551:192 (N.H. Dist. Ct., Hooksett, June 8, 1979) (child with physical and emotional disabilities has right to year-round schooling); *In re* Richard G., Appeal 1011 E (N.Y. App. Div. 2d Dep't May 17, 1976) (where needs of the child dictate, Family Court has authority to order that educational services be provided during summer as well as during regular school year); *In re* Tracey Ann Cox, No. H 4721/75 (N.Y. Fam. Ct. Apr. 8, 1976) (8½-year-old child who needs training in such self-help skills as eating, dressing, and speech therapy has right to such education); *In re* Jessup, 379 N.Y.S.2d 626 (Fam. Ct. 1975) (although right to education is not guaranteed by United States Constitution, when state undertakes to provide free education to all students it must not discriminate against emotionally handicapped children); *In re* Kaye, 379 N.Y.S.2d 261 (Fam. Ct. 1975) (child with neurophysiological maturational lags has right to special education in designated county day school, even though state commissioner did not approve education directed for child); *In re* Young, 377 N.Y.S.2d 429 (Fam. Ct. 1975) (mentally retarded child with IQ of less than 50 has right to special education program); *In re* Butcher, 373 N.Y.S.2d 514 (Fam. Ct. 1975) (consolidated proceeding involving three petitions for payment of tuition and maintenance costs at private institution for handicapped children); *In re* Devey, 370 N.Y.S.2d 351 (Fam. Ct. 1975) (authority under Section 232 of N.Y. Family Court Act for court to ensure appropriate education for handicapped students does not relieve parent of his support responsibility and, therefore, father with $39,000 gross income ordered to pay $1,000 towards special program costing $3,480); *In re* Kirschner, 72 Misc. 2d 20, 344 N.Y.S.2d 164 (Fam. Ct. 1973) (parents cannot be charged for cost of educating handicapped child where district provides free public education to others); *In re* M., 73 Misc. 2d 513, 343 N.Y.S.2d 12 (Fam. Ct. 1972) (physically handicapped child is entitled to state funds for special school unless public school system can prove it has adequate special facilities); *In re* G.H., 218 N.W.2d 441 (N.D. 1974) (handicapped child who is ward of state has right to education at state expense); Mahoney v. Administrative School Dist. #1, 601 P.2d 826 (Or. Ct. App. 1979), 3 EDUC. OF THE HANDICAPPED L. REP. 551:535 (mentally retarded child has right to year-round schooling at school district's expense); Savka v. Commonwealth, 403 A.2d 142 (Pa. Commw. Ct. 1979) (17-year-old hearing-impaired child has right to education in local school district or its intermediate unit unless these cannot provide appropriate education); Winfield v. School Bd. of Fairfax County, No. 46,028 (Va. Cir. Ct. Fairfax County Sept. 4, 1979) (14-year-old deaf child is entitled to independent educational evaluation at public expense to determine the nature and extent of child's special education needs).

[13] Federal constitutional claims have been successful in a number of cases. In addition to the *Mills* and *PARC* cases, *see* Gary B. v. Cronin, No. 79C 5383 (N.D. Ill. June 10, 1980) (memorandum) (failure to provide counseling or therapeutic services as related services is denial of equal protection); Lora v. Board of Educ. 456 F. Supp. 1211 (E.D.N.Y. 1978) *vacated and remanded on other grounds*, 623 F.2d 248 (2d Cir. 1980) (district court holds that right to treatment for handicapped children exists under due process and equal protection clauses; emotionally disturbed children might be characterized as suspect class); Howard S. v. Friendswood Independent School Dist., 454 F. Supp. 634 (S.D. Tex. 1978) (school district's dropping emotionally disturbed student from its school rolls while child was hospitalized recovering from suicide attempt constituted violation of school district's constitutional obligations); Panitch v. Wisconsin, 444 F. Supp. 320 (E.D. Wis. 1977) (equal protection clause is violated when handicapped children are denied free public special education); Kruse v. Campbell, 431 F. Supp. 180 (E.D. Pa. 1977), *vacated and remanded on other grounds*, 434 F.2d 808 (3d Cir. 1977) (district court held that statute which requires parents to contribute to cost of their handicapped child's education violates equal protection clause); Fialkowski v. Shapp 405 F. Supp. 946 (E.D. Pa. 1975) (failure to provide handicapped students with minimally adequate education is violation of due process); Colorado Ass'n for Retarded Children v. Colorado, No. C-4620 (D. Colo. July 13, 1973) (ruling on motion to dismiss) (holding San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), does not bar a suit to establish constitutional right of handicapped children to receive suitable free public education).

State courts have also indicated that handicapped youth may constitute a suspect class for the purposes of strict scrutiny in an equal protection challenge. *See* Colorado Ass'n for Retarded Children v. Colorado, No. C-4620 (D. Colo., filed Dec. 22, 1972) (classifications involving handicapped children may be ruled suspect); *In re* G.H., 218 N.W.2d 441 (N.D. 1974) (plaintiff's handicaps are "imbeen the basis of significant court decisions on behalf of handicapped students. There are constitutional bases for asserting that:

- Handicapped students have the right to receive a minimally adequate education;
- Handicapped students are entitled to procedural due process protections in decision making on exclusions from school or from particular programs and other changes in placement; and
- Handicapped students are entitled to access to programs and facilities.

1.2 HISTORY OF SPECIAL EDUCATION IN THE UNITED STATES

America has persistently claimed to revere the ideal of the common school: education for all at public expense.[14] The history of American education, however, clearly indicates an ongoing discrepancy between the common school ideal and educational reality.[15] This disparity was acceptable and perhaps even justifiable in a young and developing nation when the demand for unskilled labor was great and there was little time for education beyond the basics. It its infancy, American public education was an uncomplicated process: typically, a small number of children in a community received a basic education from one teacher who was required to deal with the needs of all ages and levels of students.

Until the latter half of the 19th century, school attendance was generally voluntary. Consequently, schools served only the most able, ambitious, and affluent youngsters.[16] For almost a century after the nation was founded, public schools served a limited population: students who did not have to enter the labor force to supplement family income, who showed potential for success in a skilled trade or profession, and who did not present behavioral or learning problems in school.

As the nation grew in size and complexity and as the social theories upon which the nation was founded were popularized, public education increased in importance. The ideal of the common school was approached between 1852 and the end of World War I when compulsory attendance laws were adopted in every state.[17]

Although compulsory attendance laws resulted at least in part from a belief in the need for free, universal education, they did not accomplish that ideal. Compulsory attendance laws frequently were not enforced. This happened for several reasons, among them the unwillingness of educators and public officials to deal with children who were difficult to educate, *e.g.*, non-English speaking transient children or children who had difficulty learning. In other instances, the labor market dictated nonenforcement; many of the children who did not attend school were immigrants who performed labor most adults would not. Often a child's parents did not want him/her to attend school. Finally, there were those children who never entered a school because of physical or mental handicaps. These children were subjected to a *de facto* exclusion from school either because their parents were unwilling to "embarrass" the family by revealing an "abnormal" child or because the parents had no hope that the child could be helped by schooling.

In addition to the *de facto* exclusion of children from compulsory attendance laws, many children were excluded from school by law. In addition to, or as part of, compulsory attendance laws, many states maintained laws which permitted the exclusion of certain types of children from school.[18] For example, the compulsory attendance law in the District of Columbia allowed for the exclusion of any child found "to be unable mentally or physically to profit from attendance at school."[19] These exclusions continued into the recent past. In a sampling conducted in the early 1970s, the Children's Defense Fund estimated that approximately two million school-age children nationwide were not enrolled in any school in 1970 despite the free public education which state constitutions had promised them.[20]

For a long period of our history, the handicapped were merely one of a number of groups of children who were not expected to attend school.[21] As public education was gradually made available to more sectors of the population, concern for the needs of the educationally handicapped increased. By the end of the 19th century, the National Education Association had established a special department to deal with the problems of the handicapped.[22]

In the late 19th century and well into the 20th century, however, even those educators who believed that the state had some responsibility to handicapped children did not believe that the state should be required to include handicapped children in regular programs or even in regular school buildings. Instead, they felt that special schools should be provided for the handicapped.[23] A number of private

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mutable characteristics determined solely by the accident of birth" to which inherently suspect classification would be applied). *Contra*, Levine v. New Jersey Dep't of Institutions and Agencies, 390 A.2d 699 (Super. Ct. N.J. 1980) 3 EDUC. OF THE HANDICAPPED L. REP. 552:163 (children in institutions are not suspect for state or federal equal protection purposes when there are real and objective criteria underlying differentiation).

[14] *See* L. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION (1951). For a typical provision in a state's constitution concerning public education, see UTAH CONST., art. X, § 1 ("The Legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to *all* children of the State" [emphasis added]).

[15] *See* M. KATZ, CLASS, BUREAUCRACY, AND THE SCHOOLS (1975).

[16] M. MAYER, THE SCHOOLS 38 (1975).

[17] *Id. See also* CHILDREN'S DEFENSE FUND, CHILDREN OUT OF SCHOOL IN AMERICA 17 (1974).

[18] E. TRUDEAU, DIGEST OF STATE AND FEDERAL LAWS: EDUCATION OF HANDICAPPED CHILDREN (1971).

[19] Quoted in Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

[20] CHILDREN'S DEFENSE FUND, *supra* note 17, at 33.

[21] In addition to the physically and mentally handicapped, blacks, Indians, women, and the poor were at various periods and in various regions of the nation denied access to free, publicly funded education. *Id.*

[22] *Id.* at 361.

[23] H. GOOD, A HISTORY OF AMERICAN EDUCATION 390 (1962). For example, Boston established a public school for the deaf in 1869. *See* C. ATKINSON & E. MALESKA, THE STORY OF EDUCATION 136 (1965).

schools for the handicapped were established in the 19th century, but little education of the handicapped took place in public schools before 1900.[24] In 1900, Chicago opened the first public school for crippled children.[25] New York City developed the first public-school speech correction clinic in 1908.[26]

By the first half of the 20th century, the notion that schools should provide varied programs to meet the educational needs of all children was gaining acceptance.[27] Between 1911 and 1920, legislation was passed in New Jersey, New York, and Massachusetts mandating that local boards determine the number of handicapped children in each school district. In the case of mentally retarded children, the local boards were required to provide special classes when ten or more [illegible] children were in the district. These requirements were coupled with financial assistance for local districts providing such programs.[28] In 1923, Oregon enacted legislation which permitted local districts to maintain special programs if they so desired.[29]

Programs in the early part of this century, so-called "opportunity classes," were often less useful than was claimed. As one commentator explains: "The wonderful idea of adjusting the individuals to our society became the dumping grounds for children who could not manage in other classes. . . ."[30]

Special class placement soon became a social stigma. School officials and their "progressive" new programs often provided little individual education; instead, they labeled children as "different" and "inferior," and rarely were those labels removed.

In 1963, the Task Force on Law of the President's Panel on Mental Retardation declared that "[o]ur basic position is that all rights normally held by anyone are also held by the retarded."[31] In 1968, the International League of Societies for the Mentally Handicapped offered a "Declaration of the General and Specific Rights of the Mentally Retarded." This document stated that "the mentally retarded person has the same basic rights as any other citizen . . . [including] a right to . . . such education, training, habilitation, and guidance as will enable him to develop his ability and potential to the fullest extent possible, no matter how severe his degree of disability."[32] In 1971, the Council for Exceptional Children, an organization of parents of the handicapped and professionals in special education, posited the idea that "education is the right of all children. The principle of education for all is based upon the philosophical premise of democracy that every person is valuable in his own right and should be afforded equal opportunities to develop to his full potential."[33]

The trend since the turn of the century has been to involve more handicapped children in educational programs. The number of handicapped children being educated has increased dramatically since World War II. In 1948, an estimated 12% of all handicapped children were being educated. By 1963, this figure had almost doubled to 21% and by 1967, it had jumped dramatically again to 33%. By 1971, an estimated 40% of all handicapped children were receiving educational services.[34] Nevertheless, this is far short of the 100% goal implied by the concept of the common school.

In the 1974-75 school year, an estimated 1.75 million handicapped youth received no educational services at all.[35] There are also indications of an extremely high degree of variance among geographic areas in the number of children whose needs are being served. Within individual states, school districts with large populations were still more likely, as in the past, to provide appropriate special educational services.[36] In many cases, special educational services existed only in districts which could financially support such services. As Weintraub indicates, even now special education exists as more of a "program 'bonus' . . . than as an integral part of the curriculum."[37] Considerable disparities still exist from state to state in the extent to which handicapped students are provided special education services. The GAO reports that, in the 1980-81 school year, the percentage of the total state school-aged population served by special education varied from a low of 4.8% in New Hampshire to a high of 10.6% in Utah.[38]

1.3 THE CONSTITUTION AND THE RIGHT TO SPECIAL EDUCATION

By the late 1960s, litigation was following the trend set by educators and social scientists. Initial cases focused upon the rights of racial and cultural minorities in the educational setting. These cases concerned school settings in which the percentage of minority students in special education classes was large relative to the percentage of minority students in the general student population. Because there was no reason to believe that minority children as a group were intellectually inferior to other children, the initial cases challenged the validity of the evaluation instruments used to determine placement in special education classes or ability grouping within regular classes.

After the turn of the century when schools began providing special services to children who did not fit the norm, school personnel began to devise and implement procedures for determining which students should be placed in particular programs.[39] The most frequently used, most "scientific" mechanism for differentiation of students has been the standardized intelligence test. However, all of the tests used regularly by American educators classify students on the basis of their ability to succeed in an educational system designed to serve average, white, middle-class children.[40] The result is race and class discrimination: minority children are assigned to nonacademic programs for slow learners and the educable mentally retarded at a rate two to three times greater than one would expect given the proportion of minority children in the total population of school-age children.[41]

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[24] C. ATKINSON & E. MALESKA, *supra* note 23, at 134-39; GOOD, *supra* note 23, at 390.

[25] C. ATKINSON & E. MALESKA, *supra* note 23, at 137.

[26] F. WEINTRAUB, A. ABESON, & D. BRADDOCK, STATE LAW AND THE EDUCATION OF HANDICAPPED CHILDREN: ISSUES AND RECOMMENDATIONS 14-15 (1972).

[27] *Id.* at 14.

[28] *Id.*

[29] *Id.*

[30] Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 294 (E.D. Pa. 1972) (testimony of Dr. I. Goldberg).

[31] President's Panel on Mental Retardation, Task Force on Law, *cited in* L. LIPPMAN & I. GOLDBERG, RIGHT TO EDUCATION: ANATOMY OF THE PENNSYLVANIA CASE AND ITS IMPLICATIONS FOR EXCEPTIONAL CHILDREN 3 (1973).

[32] L. LIPPMAN & I. GOLDBERG, *supra* note 31, at 7.

[33] *Id.*

[34] *See, e.g.*, F. WEINTRAUB, A. ABESON, & D. BRADDOCK, *supra* note 26, at 14-15.

[35] [1975] U.S. CODE CONG. & AD. NEWS 1425, 1432.

[36] *See* § 1.3.1 *infra* (discussion of a related problem: racial discrimination leading to disparate special education opportunities).

[37] F. WEINTRAUB, A. ABESON, & D. BRADDOCK, *supra* note 27, at 15.

[38] GAO REPORT, *supra* note 1, at 44.

1.3.1 HANDICAPS AND RACE

A number of challenges to school classification procedures have been filed in federal district courts. Each has claimed violations of the right to equal protection of the laws provided under the fourteenth amendment to the United States Constitution.[42] The first court decision in a case challenging the use of IQ tests for placements in classes for the educable mentally retarded occurred in the San Francisco Unified School District. The federal district court decision in *Larry P. v. Riles*[43] determined that the school district had failed to prove that the intelligence tests were a reasonable means of identifying educable mentally retarded children, given the disproportionate racial impact and the cultural bias of the tests used.[44]

The court placed the burden of proof on the school district. Judge Peckham justified shifting the burden of proof from the plantiff to the defendant for three reasons. First, classifications based upon race or resulting in racial separation should be treated automatically as suspect because of a presumption that the equal protection clause, when drafted, was aimed primarily at prohibiting racial discrimination. Second, the court perceived a positive duty on the part of the state to avoid racial imbalance in important social institutions. Finally, the court presumed that the qualities which indicate the need for special class placement are randomly distributed throughout the entire population, not concentrated in any particular racial group.[45]

This early special education case of misclassification involved strong indications of racial discrimination. What foundations had been laid for cases in which race was not a predominant factor? Only Judge Skelly Wright's opinion in *Hobson v. Hansen*,[46] a case challenging the grouping of students on the basis of intellect ("ability grouping" or "tracking") in the Washington, D.C., public schools, had dealt with this issue. Judge Wright began his opinion by noting that classification schemes are not, per se, unconstitutional. The concept of ability grouping is not in itself unacceptable because it can be reasonably related to achievement for the purposes of public education. However, Wright concluded that the operation of the tracking system in the Washington schools resulted in "a system of discrimination founded on socioeconomic and racial status rather than ability, resulting in the undereducation of many."[47] The segregation, disparities of educational opportunity, and rigidity created by the tracking system worked counter to the system's stated objectives. Judge Wright, in abolishing the tracking system, explained:

> Rather than reflecting classifications according to ability, track assignments are for many students placements based upon status. Being, therefore, in violation of its own premise, the track system amounts to an unlawful discrimination against those whose educational opportunities are being limited on the erroneous assumption that they are capable of accepting no more. . . . Any system of ability grouping which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar. . . .[48]

1.3.2 HANDICAPS AND THE RIGHT TO APPROPRIATE EDUCATION

The watershed for litigation involving the rights of children requiring special education was reached in 1971 in the case of *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*.[49] While the case was never fully litigated, the consent agreements reached by the parties and orders entered by the court have served as a guidepost for those interested in the rights of the educationally handicapped.[50]

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[39] *See* Ch. 3 *infra* (discussion of the typical evaluation process now used in most schools and the harms and errors inherent in that process).

[40] Note, however, that there is little problem with racial disproportionality in programs for students with severe handicaps or physical disabilities. *See* KIRP & YUDOF, EDUCATIONAL POLICY AND THE LAW 657 (1974). *See also* § 3.8 *infra*

[41] GAO REPORT, *supra* note 1, at 31-35.

[42] The United States Supreme Court has indicated that it finds no explicit or implicit fundamental right to education under the federal constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). However, a right to a minimal level of education, particularly for the handicapped, may exist. *See* § 1.3.3 *infra*. A number of state constitutions do recognize education as a fundamental interest. *See, e.g.*, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[43] 343 F. Supp 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). *See* Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979) (on motion for permanent injunctive relief, use of standardized intelligence tests to determine placement of black students in classes for educable mentally retarded found to violate the equal protection clause, Section 504 of the Rehabilitation Act, and Pub. L. No. 94-142).

[44] Some commentators urge that the decision of the Supreme Court in Board of Regents v. Bakke, 438 U.S. 265 (1978), signals a requirement that parties seeking to prove discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, or the equal protection clause must prove intent to discriminate. In a challenge to racial disproportions in testing or class placement, this would be almost impossible. A careful reading of *Bakke*, however, shows that the case had nothing to do with intent since the case dealt with *prima facie* discrimination. See P. Weckstein, Disposing of *Bakke*, Center for Law and Education (unpublished memo, 1981). Note also that the second decision in *Larry P.*, 495 F. Supp. 926 (N.D. Cal. 1979), was entered after *Bakke*.

[45] *See* Ch. 3 *infra*.

[46] 269 F. Supp. 401 (D.D.C. 1967), *aff'd in part and dismissed in part sub nom.* Smuck v. Hansen, 408 F.2d 175 (D.C. Cir. 1969).

[47] 269 F. Supp. 514-15.

[48] *Id.* at 514.

The Pennsylvania case began in the late 1960s with a concern on the part of the parents and friends of the mentally retarded residents of one of Pennsylvania's state institutions about the educational and rehabilitative services being provided there. Research was undertaken and, in 1969, the Pennsylvania Association for Retarded Children passed a resolution calling for legal action to establish the educational rights of the mentally retarded.[51] The Association quickly expanded the scope of its efforts and challenged Pennsylvania's entire system of public education for the retarded. PARC estimated that as many as 50,000 handicapped children of school age were not receiving appropriate educational services.[52]

A class action suit was filed by PARC against the Commonwealth of Pennsylvania, the Secretary of the Department of Education, the Secretary of the Department of Public Welfare, and the local and regional school districts in the state. Under the equal protection and due process clauses of the fourteenth amendment, the plaintiffs attacked the constitutionality of Pennsylvania's laws and procedures relating to the education of the mentally retarded.[53]

The equal protection claims were based upon an allegation that, once the state undertook to provide a free public education to all of its children, it could not deny mentally retarded children such an education. The plaintiffs alleged that the special education placement procedures violated due process since schools provided neither notice nor an opportunity for a hearing before excluding children from public education or changing their educational programs. A second due process claim was based upon allegedly arbitrary and capricious denials of education to retarded children when the statutes provided for a system of free public education to all children. Finally, the plaintiffs claimed a right to education arising from the state's constitution and statutes.[54]

Before a hearing was held, the parties reached partial agreement regarding some of plaintiffs' due process claims. When a hearing was held on *PARC*, the plaintiffs presented expert testimony from four persons prominent in the field of special education: I. Ignacy Goldberg, James J. Gallagher, Donald S. Steadman, and Burton Blatt.[55] The consensus of these experts was that special education programs should operate under the "zero reject" concept, the notion that

> all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such training and education, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.[56]

After the plaintiffs' testimony was heard, the hearing was suspended and the parties negotiated a consent agreement which settled most of the issues in the case.[57] This consent agreement was later challenged, primarily on jurisdictional grounds, by two of the state's intermediate educational units and by the Pennsylvania Association of Private Schools for Exceptional Children. The jurisdictional challenges failed and an amended consent agreement was approved by a federal district court judge in May, 1972.[58]

The agreement reached in *PARC* called for major changes in the delivery of educational services to Pennsylvania's retarded citizens. At the heart of the *PARC* order lies the requirement that every retarded Pennsylvanian between the ages of 6 and 21 must be provided access to a free program of public education appropriate to his/her learning capacity.[59] In addition, whenever a Pennsylvania school district provides preschool programs for children under age 6, it must provide access to a free public program of appropriate training and education for mentally retarded children of the same ages.[60]

The consent agreement also creates the presumption that, in all individual programs for retarded children, "placement in a regular class is to be preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training."[61]

Based upon these two general criteria, the *PARC* order created a procedural framework, implemented primarily through administrative regulations of the state department of education, to ensure equitable implementation of a plan to guarantee appropriate educational programs for exceptional children.

Another section of the *PARC* agreement enjoins state educational officials from denying tuition and support payments to any mentally retarded child unless the school district or intermediate educational unit in which the child resides can provide an appropriate educational program.[62] This section further mandates the delivery of special education services without regard to the state's ability to pay for such services. The agreement reflects a belief that homebound instruction should be made available as an alternative for all mentally retarded children, including those without a physical disability accompanying the retardation and those with retardation which constitutes only a short-term disability.[63]

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[49] 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (1972).

[50] *See, e.g.*, Taylor v. Maryland School for the Blind, 409 F. Supp. 148 (D. Md. 1976); Nickerson v. Thomson, 504 F.2d 813 (2nd Cir. 1974).

[51] L. LIPPMAN & I. GOLDBERG, *supra* note 31, at 16-20.

[52] *Id.* at 40.

[53] 334 F. Supp. at 1258.

[54] 343 F. Supp. at 284.

[55] *Id.* at 285.

[56] 334 F. Supp. at 1259.

[57] *Id.* at 1257.

[58] 343 F. Supp. at 279.

[59] 334 F. Supp. at 1260.

[60] *Id.* at 1262.

[61] *Id.* at 1260.

[62] *Id.* at 1263.

Before the *PARC* agreement, one Pennsylvania statute allowed the permanent exclusion of retarded children from public schooling. Section 1375 of the School Code provided for the exclusion from public school, with the approval of the state superintendent of public education, of any child found to be "uneducable and untrainable" by a certified school psychologist. Once a child was so certified, the obligations of the educational system ceased and the child was labeled "mentally defective" and was warehoused in institutions run by the state department of public welfare.[64]

Because the state never contradicted the testimony of PARC's expert witnesses that all children are educable, the modification of this section was obligatory. The agreement did not completely eliminate Section 1375; the department of public welfare is still allowed to classify children. It is, however, required to maintain an appropriate educational program under department of education guidelines for children assigned to it. Children can only be assigned to the department of public welfare if the program it offers is more appropriate than any offered by the department of education.[65]

To ensure implementation, *PARC* provided for the appointment of two masters, one an attorney and one a professor of special education, to oversee the programs for identification, notification, evaluation, and compliance, all of which were to be accomplished, in significant part, by September, 1972.[66]

Although it formally dealt only with the educational problems facing the mentally retarded in the public school system, *PARC* was a significant achievement for all exceptional children. The agreement was significant for its recognition of the educability of all children, no matter how handicapped, and for its mandate that all children be provided appropriate educational services.

PARC does not stand alone. *Mills v. Board of Education of the District of Columbia*[67] advanced the rights of the educationally handicapped beyond what had been provided in *PARC*. The class of plaintiffs in *Mills* included, in addition to mentally retarded students, children with behavioral problems and emotionally disturbed and/or hyperactive children who had been denied admission to or excluded from public schools and for whom no provisions for alternate educational placement, periodic review, and due process had been made.

In 1954, a school desegregation suit involving the District of Columbia was decided in favor of plaintiffs as a companion case to *Brown v. Board of Education*[68] and, 13 years later, the District's tracking system was successfully challenged.[69] Indeed, that case, *Hobson v. Hansen*, was a major influence on the court's decision in *Mills*. *Hobson* rested upon the theory that denying poor children educational opportunities equal to those available to more affluent children enrolled in the public schools violated the fifth amendment's due process clause.[70] The *Mills* court found some educationally handicapped children had been denied access not simply to equal educational opportunities, but to any form of public education and held that modifications in the District's special education programs were mandated by constitutional requirements.[71]

The problem in Washington, D.C., was substantial. Plaintiffs estimated that there were 22,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled youngsters in the District and that as many as 18,000 of them were not being furnished appropriate educational services.[72] The school district admitted that an estimated 12,340 handicapped children were not being served during the 1971-72 school year.[73] Many children whose needs could not be met in the public schools were on waiting lists for government tuition grants to enable them to enroll in private programs. Some of the children had never attempted or been allowed to enroll in public schools; others had been summarily suspended when their behavior or learning handicaps disrupted classrooms.

The school district admitted the inadequacy of its special education programs and affirmed its responsibility to provide education appropriate to the needs of each child, including education through special programs and, when necessary, private instruction. The district also admitted its responsibility for providing due process hearings and periodic review of placements.[74] The district entered into a consent agreement in December 1971, which would have eventually instituted due process procedures and a comprehensive plan for the education, treatment, and care of physically and mentally impaired children from 3 to 21 years of age.[75] The school district failed to comply with the consent order, however, and the *Mills* court order resulted.

Like Pennsylvania, the District of Columbia was governed by a compulsory attendance law that excused from attendance any child found "to be unable mentally or physically to profit from attendance at school" or to benefit from specialized instruction.[76] The board of education's regulations went further, however, declaring that "all children . . . are entitled to admission and free tuition in the Public Schools."[77] The court found a clear responsibility on the part of the board to provide whatever specialized instruction would benefit a child.[78]

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[63] Homebound instruction is considered so unfavorable an alternative that its use is to be re-evaluated at least every three months, rather than every two years (the minimum required for other programs). *Id.* at 1264.

[64] School Code of 1949, § 1375, as amended, PA. STAT. ANN. tit. 24, § 13-1375 (Purdon). *See* 334 F. Supp. at 1264. Similar provisions are included in several other states' education laws.

[65] 334 F. Supp. at 1265. *See* § 4.7 *infra*; App. A, § 140D (discussion of residential placements under federal statutes and regulations).

[66] 343 F. Supp. at 314.

[67] 348 F. Supp. 866 (D.D.C. 1972).

[68] *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

[69] Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd in part and dismissed in part sub nom.* Smuck v. Hansen, 408 F.2d 175 (D.C. Cir. 1969).

[70] *See* § 1.3 *supra*.

[71] Milles v. Board of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972).

[72] *Id.* at 868.

[73] *Id.* at 869.

[74] *Id.* at 871.

[75] *Id.* at 872.

Relying heavily throughout his opinion upon *Hobson*, Judge Waddy found that a denial of any publicly supported education equal to that received by other classes of children constituted a denial of due process.[79] The court also indicated that "due process of law requires a hearing prior to exclusion, termination, or classification into a special program."[80]

The school district based much of its defense upon a lack of sufficient funds to finance all of the services and programs required in the district.[81] The court determined, however, that "the inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."[82]

The *Mills* decision is significant because it augmented substantially the procedural framework set forth in *PARC*. In addition, *Mills* expanded the right to an appropriate education, which *PARC* recognized for the mentally retarded only, to all physically, mentally, and emotionally handicapped children. *Mills* also recognized and refused to condone the use of "disciplinary" suspensions and expulsions to exclude handicapped children from publicly supported educational programs.

1.3.3 HANDICAPPED STUDENTS AND THE CONSTITUTIONAL RIGHT TO A MINIMALLY ADEQUATE EDUCATION

In the landmark school finance case *San Antonio Independent School District v. Rodriguez*,[83] the United States Supreme Court held that there is no right to education under the federal Constitution. In refusing to recognize education as a fundamental interest for most equal protection challenges, the Court limited students' use of a strict scrutiny analysis of challenged educational practices in cases in which there were no allegations of racial discrimination.

In the *Rodriguez* case, the Supreme Court did offer dicta, however, indicating that there may be a fundamental right to receive a "minimally adequate education" once the state undertakes to provide educational services. The students challenging the Texas school finance scheme in *Rodriguez* alleged interdistrict disparities in the distribution of financial resources by the State of Texas to local school districts. Their challenge was based upon allegations of unequal access to resources for education. As the Supreme Court noted, however, none of the Texas students asserted a denial of education under the finance scheme; instead, the students challenged the differing quality of education available under the school finance scheme.

The *Rodriguez* decision might therefore be properly construed as limited to situations in which claims of variations in the quality of educational services are made as opposed to situations in which absolute denials of educational services are asserted. The *Rodriguez* decision supports the view that the right to education may be considered a fundamental interest in situations where students assert that "the system fails to provide each child with the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[84]

The Tenth Circuit recognized this narrow interpretation of *Rodriguez* in the Denver school desegregation case:

> [T]he Supreme Court held that education is not a right protected by the Constitution, except, perhaps insofar as some minimal quantum of education may be necessary to enable the exercise of the basic rights of speech and voting. Of course, where the state has undertaken to provide an education to its citizens, it must be made available to all on equal terms."[85]

Placement of a handicapped student in an inappropriate program or the total exclusion of a handicapped student from education constitutes denial of access to a minimally adequate level of education.

Asserted denials of a right to a minimally adequate education for handicapped students have been successfully presented to federal courts. In *Fialkowski v. Shapp*,[86] multi-handicapped students asserted that they were denied equal protection under the United States Constitution in that the programs and services offered were so inappropriate that the students could not benefit from them. The students also alleged that state and local school officials had a constitutional duty to provide them with an appropriate education.

The *Fialkowski* court applied the *Rodriguez* decision to the special education context. According to the *Fialkowski* court, the claims presented to it were substantially different from those in the Texas finance case since the handicapped students were denied all educational opportunities rather than simply receiving an education of lower quality. To the *Fialkowski* court, therefore, the situation fell squarely within the ruling outlined by the Supreme Court as the exception to *Rodriguez*:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of

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[76] *Id.* at 874.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 875.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 876.
[83] 411 U.S. 1 (1973).

[84] *Id.* at 37.
[85] *Keyes v. School Dist. No. 1, Denver, Colo.*, 521 F.2d 465, 482 (10th Cir. 1975).
[86] 405 F. Supp. 946 (E.D. Pa. 1975).

> educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where . . . no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[87]

The *Fialkowski* court then went on to hold that "there exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education."[88]

The *Fialkowski* decision also articulates the possibility of a constitutional standard for measuring equal educational opportunity. The court suggests that equal educational opportunity should be defined to include equal access to minimal educational services.[89]

In a second case involving special education, a United States District Court for the Eastern District of Pennsylvania has indicated that the *Rodriguez* court "left open the possibility that the denial of a minimally adequate educational opportunity may trench upon a fundamental interest, if the state has undertaken to provide a free public education."[90] The court went on to indicate that

> this minimum education equal protection theory is distinct from the plaintiffs' right to education claim based on the First, Ninth, and Fourteenth Amendments. The latter theory would impose on the state an absolute duty to provide the minimal educational services necessary to prepare children for democratic citizenship in their adult lives.[91]

Courts have found that handicapped children are members of a suspect class, which entitles them to strict judicial scrutiny of challenged educational practices.[92] Strict scrutiny of constitutional challenges of educational practices involving the handicapped can similarly be sought when there is a high correlation between handicap and race. For example, black students are significantly overrepresented in special education placements of the educable mentally retarded.[93] Claims in these cases can focus on the racial components of the special education problem and bring to bear strict scrutiny of the students' equal protection race claims.[94]

1.3.4 HANDICAPPED STUDENTS AND THE RIGHT TO PROCEDURAL DUE PROCESS PROTECTIONS IN PROGRAMMING AND PLACEMENT

The issue of procedural due process protections for handicapped students was first addressed in the federal courts in a consent agreement in *PARC*.[95] The *PARC* agreement required that all students thought to be mentally retarded receive notice and a hearing prior to changes in placement or programming.[96] This requirement was echoed in *Mills v. Board of Education*.[97] The *Mills* court required, on federal constitutional grounds, due process protections, including the right to a hearing prior to classification into a special program. The hearing must be conducted by an impartial hearing officer, and the burden of proof falls on the school.[98] In addition, the *Mills* court held that there must be a presumption that all students can and should be placed in regular classes; placement in special settings is to occur only when necessary to provide appropriate educational services.[99]

1.3.5 IMPORTANCE OF CONSTITUTIONAL CLAIMS

The importance of constitutional arguments to support the claims of the handicapped cannot be overstated. There are strong constitutional foundations for most of the federal statutory and regulatory provisions regarding the education of the handicapped. Repeal of these statutes and regulations, which is espoused by many state and local officials, would not eliminate the relevant federal constitutional rights. Similarly, many state laws concerning the handicapped are parallel to and based upon state constitutional requirements. Finally, there are clear indications in the legislative history of the statute that Congress intended to embody in the Education for All Handicapped Children Act, Public Law No. 94-142, all the constitutional rights of handicapped students which federal and state court cases had identified prior to 1975.[100]

1.4 STUDENTS PROTECTED UNDER FEDERAL LAW

In 1975, under the Education for All Handicapped Children Act, Public Law No. 94-142, federal requirements were rewritten in response to *Mills*, *PARC*, and state court litigation on the rights of the handicapped. The requirements mandated even greater protections for children involved in special education and increased federal contributions to the financing of special education programs.[101] Almost simultaneously, regulations were being promulgated under Section 504 of the Rehabilitation Act of 1973,[102] a broad civil rights statute prohibiting discrimination against the handicapped by any program receiving any type of federal assistance. Certain regulations promulgated under Section 504 concerning the activities of educational institutions also protect the interests of children needing special education by expanding the federal requirements for aid recipients.[103]

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[87] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). In a footnote to the cited passage from *Rodriguez*, the *Fialkowski*, court noted that "[t]here can be no doubt that the denial of an adequate education to a retarded child is a denial of the opportunity to acquire the basic skills of citizenship, and may result in the loss of freedom from later state institutionalization." 405 F. Supp. at 958.

[88] 405 F. Supp. at 958.

[89] *Id.*

[90] Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976), *aff'd*, 557 F.2d 373 (3rd Cir. 1977), *on remand*, 419 F. Supp. 960 (E.D. Pa. 1976), *aff'd*, 578 F.2d 513 (3rd Cir. 1978).

[91] 408 F. Supp. at 835.

[92] *See* Fialkowski v. Snapp, 405 F. Supp. 946, 959 (E.D. Pa. 1973); Colorado Ass'n for Retarded Children v. Colorado, No. C-4620 (D. Colo., filed Dec. 22, 1972); *In re* G.H., 218 N.W.2d 441 (N.D. 1974) (plaintiff's handicaps are the sort of "immutable characteristic determined solely by the accident of birth" to which suspect classification analysis should be applied).

[93] *See* § 1.3.1 *supra* (handicaps and race), § 3.9 *infra*.

[94] *See* App. B, § 140B.

[95] 343 F. Supp. 279 (E.D. Pa. 1972).

[96] *Id.* at 279.

[97] 348 F. Supp. 866 (D.D.C. 1972).

[98] *Id.* at 875. These requirements were codified at 20 U.S.C. § 1416.

[99] This was codified as the least restrictive environment requirement in Pub. L. No. 94-142, 20 U.S.C. § 1412(5). *See* § 4.6 *infra*.

[100] S. REP. NO. 94-168, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1432.

Public Law No. 94-142 was designed to ensure that all handicapped children have access to free appropriate public education designed to meet their individual needs. The law has two major thrusts. First, it disseminates federal aid to provide for part of the excess cost of educating the handicapped.[104] For the 1980 fiscal year, federal funding provided $227 per handicapped child (up from $72 per child in fiscal year 1977).[105] Second, Public Law No. 94-142 asks for something in return. It requires that recipients of this federal assistance provide procedural due process protections in evaluation and placement,[106] rights to hearings and appeals,[107] confidentiality of and access to school records,[108] and certain kinds of educational programming.[109] The federal statutes extend protections to categories of students.[110] An advocate may litigate under one or more statutes depending upon the type of client represented and the issue at hand.

Provisions of Public Law No. 94-142 apply to the following categories of handicapped children: mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired children, and children who, due to specific learning disabilities, require special education and related services.[111]

Regulations under Public Law No. 94-142 define in more detail the handicapping conditions covered by the law.[112] These definitions tend to be multifaceted, requiring a child to exhibit several characteristics before (s)he is considered handicapped. For example, mental retardation is not exhibited solely by below average performance on a standardized test of intelligence; such performance must coexist with problems in adaptive behavior before the child can be labeled mentally retarded.[113]

Section 504, the broader civil rights statute, is accompanied by regulations which define handicapped persons in a much more general manner, thereby protecting more people. These regulations indicate that a handicapped person is anyone who:

- Has a physical or mental impairment which substantially limits one or more major life activities (including learning);
- Has a record of such impairment; or
- Is regarded as having such an impairment.[114]

The Public Law No. 94-142 regulations are designed, among other things, to make less likely the misclassification of students as handicapped, thus reducing the number of children stigmatized. The Section 504 regulations, however, are meant to protect not just individuals who have *bona fide* handicapping conditions, but also those individuals who were misclassified as handicapped in the past.

While Public Law No. 94-142 clearly covers children in the defined categories of handicapping conditions, it is arguable that a child falls under the protections of Public Law No. 94-142 as soon as (s)he is singled out from his/her classmates for evaluation for special education programs.[115] Usually this occurs when a child's regular classroom teacher notices that the child differs from his/her peers in academic development or behavior patterns, although sometimes the child is singled out as a potential special education candidate by the family, other educators, or community agencies.

A third federal statute, the Developmentally Disabled Assistance and Bill of Rights Act,[116] (hereinafter "D.D. Act"), offers still another definition for individuals afforded protection under a federal statute concerning education of handicapped individuals. The D.D. Act is designed to benefit individuals who have multiple long-term physical and/or mental impairments disabling them in their abilities to function in the areas of self-care, language, learning mobility, self-direction, or self-sufficiency. Impairment in three or more areas of functioning is required before an individual is entitled to the protection of the D.D. Act. Further, the handicaps must be sufficiently serious to necessitate long-term individual care.[117]

A primary goal of the D.D. Act is to aid those whose needs cannot be met under Public Law No. 94-142 or Section 504. Like Section 504, the D.D. Act extends to both public welfare services and education. Educational services provided under the D.D. Act include diagnosis and evaluation.[118] Individuals who qualify have a right to appropriate treatment, services, and habilitation designed to maximize their developmental potential.[119] Like the other two federal statutes, a "least restrictive alternative" requirement is included.[120] Finally, the D.D. Act requires "individual habilitation plans," which parallel the individualized education programs (IEPs) required under Public Law No. 94-142.[121]

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[101] The Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, codified at 20 U.S.C. §§ 1401-1416.

[102] 29 U.S.C. § 794.

[103] 34 C.F.R. §§ 100.31-.39.

[104] 20 U.S.C. § 1411(a)(1).

[105] GAO REPORT, *supra* note 1, at 8.

[106] 20 U.S.C. § 1412(5).

[107] *Id*. § 1415.

[108] *Id*. § 1417(c).

[109] *Id*. § 1401(19).

[110] *See* Ch. 2 *infra* (detailed description of the handicapping conditions and the programs and services they require).

[111] 20 U.S.C. § 1401(1).

[112] 34 C.F.R. § 300.5(b). *See* Ch. 2 *infra*.

[113] *Id*. § 300.5(b)(4).

[114] *Id*. § 104.3(j).

[115] The regulations under Pub. L. No. 94-142 indicate that evaluation begins once a child is singled out and individually subjected to evaluation procedures. 34 C.F.R. § 300.500. The statute and regulations give significant protections to the child and family during the evaluation and preplacement process even before a child has been determined to be handicapped, indicating that coverage under Pub. L. No. 94-142 is also given to children alleged to be handicapped but not yet formally identified as handicapped.

[116] 42 U.S.C. §§ 6000-6081.

[117] *Id*. § 6001(7).

[118] *Id*. § 6001(8)(A).

[119] *Id*. § 6010(4).

Under Section 504 and Public Law No. 94-142, every handicapped child is entitled to an education appropriate to his/her individual needs and provided at public expense. A "free appropriate public education" entails regular or special education and related services, at public expense, and under public supervision,[122] designed to meet individual educational needs.[123] A handicapped child cannot be required to pay any fees, such as those for textbook rentals or uniforms, that nonhandicapped students are not also required to pay.[124] The state must pay all costs, including the costs of nonmedical care, room, and board for a child placed in a residential program when it is the only type of program that can meet the child's needs.

All educational programs and services must be provided in the "least restrictive environment" (LRE) appropriate to meet the child's needs.[125] Full-time placement in a regular class is the least restrictive environment in which a child can be placed; full-time placement in a special school or at home is the most restrictive. A handicapped child should be placed in the regular education program unless the school can show that the handicapped child cannot be educated satisfactorily there, even with the use of supplementary aids and services.[126] A school is required to educate handicapped children with nonhandicapped children to the maximum extent appropriate for the handicapped.[127] Handicapped children should, at a minimum, be "mainstreamed" with nonhandicapped children for nonacademic and extracurricular programs.[128]

All children are entitled to certain procedural due process protections in educational decision making related to special education.[129] Written prior notice must be provided to a child's parents or guardian whenever officials propose to initiate or change the child's identification, evaluation, or educational placement.[130] Unless it is "clearly not feasible to do so," this notice must be in the parents' or guardians' native language.[131] The notice must also contain a description of the various procedural safeguards available to the family under 20 U.S.C. § 1415.

To protect a child who is a state ward or whose parents or guardians are unknown or unavailable, Public Law No. 94-142 requires the establishment of special procedures. These procedures must include a mechanism for appointing a surrogate parent to protect the child's interest by exercising the rights afforded parents and guardians under the statute. The surrogate cannot be an employee of any state, federal, or intermediate educational agency involved in the education or care of the child.[132]

The procedural protections required by both Public Law No. 94-142[133] and the regulations promulgated under Section 504 of the Rehabilitation Act[134] include safeguards for the confidentiality of student records and opportunities for the parents or guardian to examine relevant records relating to the identification, evaluation, placement, and the provision of a free appropriate education to the child. The provisions are separate from those of the Family Educational Rights and Privacy Act, the so-called "Buckley Amendment,"[135] which concerns all types of student records maintained on both regular and special students. While in most instances the provisions of the special education laws and regulations are nearly identical to the student records law and regulations, notable differences exist concerning notice and maintenance of data.

There are detailed provisions in the Education of All Handicapped Children Act, Public Law No. 94-142, concerning procedures for hearings and appeals on issues relating to identification, evaluation, placement, and the provision of services.[136] The statute allows access to the hearing and appeal mechanism by parents or guardians who have any complaints relating to any of these four areas. It apparently permits review of all aspects of a handicapped child's educational experience.

When a complaint is brought, an impartial due process hearing is to be conducted by either the state, local, or intermediate educational agency, in accordance with relevant state laws and regulations. In no case is the hearing officer to be an employee of any agency involved in the education or care of the child. If the original hearing is to be conducted by a local or intermediate educational agency, there is a right to an impartial administrative review by the state educational agency. At any administrative hearing, all parties have:

- The right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;
- The right to present evidence and confront, cross-examine, and compel the attendance of witnesses;
- The right to a written or electronic verbatim record of such hearing; and
- The right to written findings of fact and decisions.[137]

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[120] *Id.* § 6010.

[121] *Id.* § 6011(b).

[122] 20 U.S.C. § 1401(18). *See* § 4.4 *infra*.

[123] *Id.*; 34 C.F.R. § 104.33(b). *See* Ch. 4 *infra*.

[124] 34 C.F.R. § 104.33(c). Note, however, that all students may be able to challenge some school fees, such as book rental fees, successfully on the grounds that they abridge a state constitutional right to education or are otherwise discriminatory. *See* K. Boundy, SCHOOL FEES, Center for Law and Education (unpublished memos, 1979).

[125] 20 U.S.C. § 1412(5)(B). *See* § 4.6 *infra*.

[126] 34 C.F.R. § 104.34(a).

[127] 20 U.S.C. § 1412(5)(B).

[128] 34 C.F.R. § 104.34(b).

[129] 20 U.S.C. § 1415.

[130] *Id.* § 1415(b)(1)(C).

[131] *Id.* § 1415(b)(1)(D).

[132] *Id.* § 1415(b)(1)(B). *See* § 4.3 *infra*.

[133] *Id.* § 1415(b)(1)(A).

[134] 34 C.F.R. § 104.36.

[135] 20 U.S.C. § 1232g.

[136] 20 U.S.C. §§ 1415(b)(1)(B)-(E). *See also* 34 C.F.R. § 104.36; Ch. 5 *infra*.

[137] 20 U.S.C. § 1415(d). *See* Ch. 5 *infra*.

Any party involved in a state administrative hearing has the right to bring a civil action concerning the complaint in any state court of competent jurisdiction, or in federal district court without regard to the amount in controversy.[138] Pending the outcome of litigation, the child will remain in the current educational placement unless there is an agreement to the contrary; however, a child who has not been admitted to public school will be placed in school unless the parents object.

Both the regulations promulgated under Section 504 of the Rehabilitation Act and the statute for the education of the handicapped contain requirements for evaluation and placement procedures.[139] Any child considered handicapped must be fully evaluated before being placed in either a regular or special program.[140] Tests and evaluation materials must not be racially or culturally discriminatory.[141] They must be administered in the child's native language or primary mode of communication unless it is clearly not feasible to do so[142] and they must also be validated for the specific purpose for which they are used and administered by trained personnel.[143] Placement decisions cannot be based on the results of any one evaluation procedure; information concerning aptitude, achievement, teacher recommendations, physical condition, socio-cultural background, and adaptive behavior must be considered.[144] If a parent or guardian wishes, (s)he has the right to obtain an independent educational evaluation of the child.[145]

Once evaluation data has been gathered, a conference including school officials, the teacher, the parents or guardian, and, whenever appropriate, the student is held to determine the appropriate educational placement and to write an individualized educational program for the child.[146] The individualized education program is a written statement which includes:

- The present levels of educational performance of the child;
- The annual goals for the child, including short-term instructional objectives;
- The specific educational services to be provided to the child and the extent to which the child will be able to participate in regular classroom programs;
- The projected date for initiation of services and the anticipated duration of services; and
- The appropriate objective criteria, evaluation procedures, and schedules for determining, at least on an annual basis, if instructional objectives are being achieved.[147]

The laws discussed label students as being handicapped. Despite the many benefits of these laws, the effect of labeling a student handicapped can be significant. In most instances, the label stigmatizes the child and may indirectly limit some educational and social opportunities. This is most clearly evidenced by the effect the label "mentally retarded" has for most children. A child who is classified as mentally retarded is usually a child who has received a low score on some type of standardized intelligence test. On the erroneous assumption that a child with a low IQ score is a child who has a low level of innate potential, most children labeled mentally retarded are regarded as children incapable of academic success. However, some of these children may not be mentally retarded at all but may only be educationally disadvantaged. What is important is the quantity, quality, and appropriateness of the child's educational program rather than the label placed on the child.

Because of the harmful effects that are possible once a student has been labeled as handicapped, an advocate should ask the family to make a careful decision about whether it is worth pursuing remedies for educational problems under the federal statutes concerning education of the handicapped.

The label of a handicapping condition is important only to determine whether a student falls under the protection of the federal statutes. A child's advocate should be cautious when educators attempt to use labeling as a means of simplifying evaluations, recommendations for placement, and programming decisions. Attention should be focused instead upon specific, accurate, and detailed descriptions of a student's strengths and weaknesses, and upon the tailoring of a detailed individualized education program to meet the student's needs. Standardized diagnosis and courses of treatment are not appropriate given the statutory requirements for individualized programming.

1.5 STATE-OPERATED PROGRAMS FOR HANDICAPPED CHILDREN

Students placed in state-run facilities for the handicapped, such as state schools for deaf or blind students, are often in programs funded in part with federal monies made available under Public Law No. 89-313 (Federal Assistance to State-Operated and Supported Schools for the Handicapped). Public Law No. 89-313, which is part of Title I of the Elementary and Secondary Education Act of 1965, provides federal aid for the special education of handicapped children who are enrolled in state-operated or state-supported schools or for students previously enrolled in such schools who have been transferred to special education programs in local schools. The statute has its own set of regulations which are in addition to the requirements of the other federal statutes and regulations that apply to education of the handicapped.[148]

As of the 1982-83 school year, the Education Consolidation and Improvement Act (ECIA) of 1981[149] will supercede Title I. Under ECIA, the old Title I aid programs, including the one for state-operated programs for handicapped children, will become Chapter I of ECIA. Both the old and the new statutes are funding statutes which do not establish any rights or entitlements for handicapped students. It is important to know of the existence of this federal funding program in cases in which the resources available for students in, or formerly in, state-operated programs become an issue.

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[138] *Id.* §1415(e).

[139] *Id.* §§ 1412(5)(C), 1415(b)(1)(A); 34 C.F.R. § 104.35. *See* Chs. 3-4 *infra*.

[140] 34 C.F.R. § 104.35(a).

[141] 20 U.S.C. § 1412(5)(C).

[142] *Id.* § 1412(5)(C). *See also* 34 C.F.R. § 104.5(b)(3).

[143] 34 C.F.R. § 104.35(b)(1).

[144] 20 U.S.C. § 1412(5)(C); 34 C.F.R. § 104.35(b).

[145] 34 C.F.R. § 300.503(a)(3).

[146] 20 U.S.C. § 1415(b)(1)(A). *See* § 4.2 *infra*.

[147] *Id.* §§ 1401(19), 1414(a).

[148] *Id.* § 241c-1. These regulations are found at 34 C.F.R. Pt. 302.

[149] Pub. L. No. 97-35.

1.6 SPECIAL EDUCATION FOR NATIVE AMERICAN STUDENTS

Advocacy on behalf of a Native American student in need of special education presents special difficulties. While the vast majority of Indian children attend school in local school districts, many attend either federal schools operated by the Bureau of Indian Affairs (BIA) of the United States Department of the Interior or community-controlled schools run by tribal groups or Indian communities with contract or grant money from the federal government or other sources.[150]

Several separate federal provisions concern the education and special education of Indian students. First, the Federal Impact Aid Act provides financial assistance to school districts containing tax-exempt Indian land.[151] The terms of Public Law No. 94-142 and its implementing regulations have special provisions for special education administered by the BIA. The provisions ensure that handicapped students under the BIA's jurisdiction have the same guarantee of the right to free and appropriate public education as other students. The Senate committee reporting out the bill which became Public Law No. 94-142 stated:

> [A]ll requirements applied to state and local education agencies respecting eligibility and application shall apply to the Department of the Interior, and . . . all benefits and protections provided for handicapped children served by the state and local educational agencies shall also be provided to handicapped children served by the Department of the Interior.[152]

To ensure that free and appropriate public education is provided to handicapped Indian students either in BIA schools or under the jurisdiction of BIA schools (*i.e.*, persons who should have received but were denied special education services), Public Law No. 94-142 authorizes the Secretary of Education to make payments to the Secretary of the Interior for the education of handicapped children on reservations served by BIA schools following the submission of a plan by the BIA similar to the state plans required under 20 U.S.C. § 1414(a).[153] The BIA must comply with the same requirements as the states concerning public participation in developing the program plan,[154] provision of a free appropriate public education,[155] priorities in the use of federal education of the handicapped funds,[156] individualized education programs,[157] provision of programs,[158] and due process protections.[159]

Pursuant to its responsibility for special education under Public Law No. 94-142 and Section 504 of the Rehabilitation Act, the BIA has issued proposed regulations concerning the operation of special education programs for handicapped children enrolled in or eligible for schools operated and/or funded by the BIA.[160] Advocates for Native American children need to review and compare carefully the BIA regulations with both Public Law No. 94-142 and Section 504 statutory and regulatory provisions. In many instances the BIA regulations differ from the standards set forth in Public Law No. 94-142, Section 504, or their implementing regulations. Some differences result in increased protection for Indian children; others provide less protection. A careful comparison is mandatory so that the advocate may rely upon the provisions which most benefit the student. When the BIA regulations afford greater benefits, they should be the basis of efforts. When the BIA regulations are unfavorable and conflict with the statute or regulations under Public Law No. 94-142 or Section 504, the advocate should argue that the Public Law No. 94-142 and/or Section 504 provisions must control the situation since they are the overriding law in the area.

Advocates for Indian children should be aware of federal provisions for funding and delivery of general educational programs and services for Native Americans. The Johnson-O'Malley Act of 1934[161] is the major mechanism used by the United States Department of the Interior to fund educational programs and other services through contracts with state and local agencies. In addition, federal school impact aid provides financial assistance to any public school district suffering financial difficulty because the district contains tax-exempt Indian land.[162] The Office of Indian Education within the United States Department of Education also funds projects for Indian students.[163]

Unfortunately, confusion has resulted from the separate provisions in Public Law No. 94-142 and various other federal aid programs for Native Americans about who is responsible for the special education of some Indian children. Often, the overlapping of jurisdiction over Indian children has led to no services at all; each of the potential service-providers contends that the other agencies should provide and/or pay for the relevant services.

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[150] Ramirez and Smith, *Federal Mandates for the Handicapped: Implications for American Indian Children*, 17 EXCEPTIONAL CHILDREN 521-28 (1978).

[151] 20 U.S.C. §§ 238(a), 241aa-241ff.

[152] SENATE LABOR AND PUBLIC WELFARE COMM., EDUCATION FOR ALL HANDICAPPED CHILDREN ACT, S. 6, S. REP. NO. 94-168, 94th Cong., 1st Sess. 14 (1975).

[153] 20 U.S.C. § 1411(f). *See* regulations at 34 C.F.R. §§ 300.260-.263, .709, .753.

[154] 34 C.F.R. § 300.261, .280-.284.

[155] 34 C.F.R. §§ 300.300-.307, .600-.653. *See* Ch. 4 *infra*.

[156] 34 C.F.R. §§ 300.320-.324.

[157] 34 C.F.R. § 300.340-.349. *See* §§ 4.2-4.2.6 *infra*.

[158] 34 C.F.R. §§ 300.360-.372. *See* §§ 4.1-4.9.3 *infra*.

[159] 34 C.F.R. §§ 300.500-.593. *See* §§ 4.2.6, 5.3 *infra*.

[160] 25 C.F.R. Part 31k. *See* 45 Fed. Reg. 64,472 (1980).

[161] 25 U.S.C. §§ 452-454.

[162] Pub. L. No. 81-874, 20 U.S.C. § 238(a)(2).

[163] Pub. L. No. 92-318, 20 U.S.C. § 3385.

Congress noted in 1977 that the BIA has not met its special education responsibilities for Indian children.[164] This failure and the resulting confusion about responsibility for educating certain handicapped Indian students suggests that Indian students who need special education may be one of the most underserved populations in the country. While many Indian students live in isolated rural areas which have a low incidence of handicapping conditions, those who need special education may present a particular challenge for the advocate, that is, the challenge of overlapping legal responsibilities for services.

1.7 STATE LAWS CONCERNING SPECIAL EDUCATION

Following the two landmark decisions in the *PARC* and *Mills* cases discussed above, most states instituted legislation to rewrite their laws relating to special education. Much legislation was patterned after a model state statute promulgated by the Council for Exceptional Children,[165] designed as a "comprehensive set of model statutory provisions to provide a full legal basis for practicable and effective programs of education for handicapped children."[166]

Though most of the state statutes and implementing regulations were intended to conform with federal constitutional decisions and Public Law No. 94-142, some are far more consistent with federal law than others, and some offer more substantive or procedural protections than others. This volume cannot include a discussion of state statutes and regulations. However, the advocate must be familiar with state provisions that can serve to bolster or fill gaps in federal claims. Where state law is inconsistent with federal law, the federal law preempts state law and should prevail. In each case, the relevant provisions of state and federal law should be compared so the best strategies and legal theories can be employed on behalf of a client.

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[164] SENATE COMM. ON APPROPRIATIONS, DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATIONS BILL FOR 1978, S. REP. NO. 95-276, 95th Cong., 1st Sess. (1977).

[165] F. WEINTRAUB, A. ABESON, & D. BRADDOCK, STATE LAW AND EDUCATION OF HANDICAPPED CHILDREN: ISSUES AND RECOMMENDATIONS (1972).

[166] *Id*. at 110.

SUMMARY OF FEDERAL STATUTES AND REGULATIONS CONCERNING CHILDREN REQUIRING SPECIAL EDUCATION*

(Appendix 1A)

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* The statutes and regulations concerning handicapped students summarized here are the most significant ones; other provisions are described throughout the text.

IDENTIFICATION AND PHASE-IN

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	**P.L. 94-142 Regulation 34 C.F.R. Part 300**	**§504 Rehabilitation Act of 1973, 29 U.S.C. §794**	**§504 Regulations 34 C.F.R. Part 104**	**DD Act 42 U.S.C.§6000 *et seq.***	**DD Regulations 45 C.F.R. Part 1385 (Proposed 45 Fed. Reg. 31006, May 9, 1980)**	**Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B**
HANDICAPPING CONDITIONS COVERED	child needing special ed. who is mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically or other health-impaired-§1401(1) specific learning disabilities-§1401(15)	definitions-§300.5 specific learning disabilities-§300.541	"No otherwise qualified handicapped individual in the United States . . . shall, solely, by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	anyone with physical or mental impairment substantially limiting one or more major life activities including learning) or with a record of such impairment or who is regarded as having such §104.3(j)	persons with severe, chronic disability which is: attributed to mental and/or physical impairment; manifested before age 22; likely to continue indefinitely; resulting from functional limitations (in three or more areas) of self-care, language, learning, mobility, self-direction, self-sufficiency; results in need for longterm individual care-§6001(7)	definitions-§1385.2	See §504-guidelines apply only to students enrolled in, or seeking enrollment in, vocational programs (see §I.D)
CHILD SEARCH	required to identify locate, and evaluate all children who are handicapped and in need of special ed and to determine which are and are not receiving needed services-§1414(a)(1)	required to identify, locate, and evaluate all children who are handicapped and in need of special ed-§300.220		required to identify and locate every qualified handicapped person not receiving public education and notify each of rights-§104.32			

IDENTIFICATION AND PHASE-IN

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C.§6000 *et seq.*	DD Regulations 45 C.F.R. Part 1385 (Proposed, 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
PRIORITIES FOR SERVICE	state must establish priorities for serving, first, children not receiving an education and then, children receiving an inadequate education-§1412(3)	use federal funds to provide FAPE first to children who are not receiving any education and then to provide services to those receiving an inadequate education-§300.320-.324	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."		persons whose needs can't be met under P.L. 94-142 or §504 or other health, education or welfare programs-§6000(b)-(2)(A) "priority services" are case management, child development, alternative community living arrangement, and nonvocational social-developmental services-§6601(8)(B)	priorities-§1385.2 "priority services"-§1386.47;§1386.45	
TIMELINES FOR SERVICE	FAPE available for all handicapped children from 3 to 18 years old by 9/1/78 and for all between 3 and 21 years old by 9/1/80 unless state law to contrary-§1412(2)(B)	§300.122 §300.300		effective 6/3/77 no handicapped person may be excluded; all other requirements must be met at earliest practicable time and in no event later than 10/1/78-§104.33(D)			

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EVALUATIONS

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C.§6000 *et seq.*	DD Regulations 45 C.F.R. Part 1385 (Proposed, 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
EVALUATIONS REQUIRED	§1412(2)(C)	required prior to placement-§300.531 defined-§300.500	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	required prior to placement or any change in placement-§104.35(a)	diagnosis and evaluation are services to be provided the developmentally disabled-§6001-(8)(A)		
COST OF EVALUATION		independent evaluation at public expense-when-§300.503(a)(3) (ii) and (6)		see "free education"-§104.33(c)			
INDEPENDENT EVALUATION	right to-§1415(b)(1)(A)	defined-§300.503 (a)(3) use of results-§300.503(c) requested by hearing officer-§300.503(d)					

EVALUATIONS

	P.L. 94-142 20 U.S.C. §§1401 et seq.	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C.§6000 et seq.	DD Regulations 45 C.F.R. Part 1385 (Proposed, 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
EVALUATION INSTRUMENTS, PROCEDURES	nondiscriminatory test materials in usual mode of communication required; multi-faceted evaluations required-§1412(5)(C)	in native language-§300.532(a)(1) validated instruments-§300.532(a)(2) trained evaluators-§300.532(a)(3) nondiscriminatory as to race, culture, handicap-§300.532(c), .530(b) multifaceted §300.532(b)-(f) special procedures, participants for evaluating specific learning disabilities-§300.540-.543	"No otherwise, qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	validated instruments-§104.35(b)(1) nondiscriminatory as to handicap-§104.35(b)(3) multifaceted-§104.35(b)(2)	diagnosis and evaluation are services to be provided the developmentally disabled-§6001(8)(A)		
RE-EVALUATIONS		at least every three years-§300.534(b) anytime at parental or teacher request or if warranted-§300.534(b)		periodic reevaluation of students provided special ed required-§104.35(d)			

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PLACEMENT AND PROGRAMMING

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C.§6000 *et seq.*	DD Regulations 45 C.F.R. Part 1385 (Proposed 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
DECISION-MAKING FOR PLACEMENT	by local or intermediate educational agency, teacher, parents, and, where appropriate, the child-§1401(19)	parental, child role-§§300.344-.345 participants-§300.344 decisions by group knowledgeable about child-§300.533(a)(3) based upon many factors-§300.533(a)(1)	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	draw on information from variety of sources-§104.35(c) group decision-§104.35(c)			system of admissions should not work to exclude handicapped from vocational programs-§IV.A, V
FREE APPROPRIATE PUBLIC EDUCATION (FAPE)	special ed and related services at public exp., under public supervision and direction; meeting state standards at preschool, elementary, and secondary levels; provided under individualized education programs-§1401(18) right to-§1415(b)(1)(A)	defined as per statute-§300.4 timelines, methods, types, services, options, etc.-§300.300-.307		at no cost to parents except for fees imposed on non-handicapped also-§104.33(c) designed to meet individual needs-§104.33(b) provided with procedural protections-§104.33(b)	right to appropriate treatment, services, and habilitation for developmental disabilities designed to maximize developmental potential-§6010(1), (2), (4) right to nourishing diet, medical and dental services, freedom from unnecessary physical or chemical restraints, family visits, safe environment-§6010(3)(B)	rights of person with developmental disabilities to appropriate treatment services, habilitation maximize potential-§1385.3	numerical limits on admission or student optional enrollment in vocational programs can't exclude students on basis of handicap-§IV.F. integrated to maximum; if not, comparable services, facilities-§VI, §VII

PLACEMENT AND PROGRAMMING

	P.L. 94-142 20 U.S.C. §§1401 et seq.	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C.§6000 et seq.	DD Regulations 45 C.F.R. Part 1385 (Proposed, 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
LEAST RESTRICTIVE ENVIRONMENT (LRE)	to maximum extent appropriate, handicapped must be educated with nonhandicapped and segregation of handicapped occurs only when education in regular class with supplementary aids and services is unsatisfactory-§1412(5)	defined-§300.550 continuum of services, placements, nonacademic services, etc.-§300.551-.556 describe extent of LRE in IEP-§300.346(c)	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	maximum integration in academic settings-§104.34(a) maximum integration in non-academic settings-§104.34(b) if not integrated, comparable facilities-§104.34(c)	treatment, services, and habilitation provided in setting least restrictive of physical liberty-§6010(2)		physical plant of a vocational facility can't be added to, modified renovated so as to create, maintain, or increase student segregation on basis of handicap-§IV.D modifications in programs must be made to accommodate handicapped-§IV.N secondary level handicapped students must be in regular program to maximum extend appropriate-§IV.A
PRIVATE SCHOOL PLACEMENT	services required at no cost if properly placed or referred by educational agency-§1413(a)(4) See also 20 U.S.C. §1221e-3	same rights-§300.2 if appropriate, no cost to parents-§300.302 implementation when placed by parents-§§300.450-.452 See also 34 C.F.R. §§76.650-.662		at no cost to parents only if FAPE not available publicly-§104.33(c)(3) and (4)			

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PLACEMENT AND PROGRAMMING

	P.L. 94-142 20 U.S.C. §§1401 et seq.	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C. §6000 et seq.	DD Regulations 45 C.F.R. Part 1385 (Proposed 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
INDIVIDUALIZED EDUCATION PROGRAM (IEP)	joint written statement of child's present levels of educational performance, annual goals, short-term instructional objectives educational services, extent of regular program participation, date of initiation of services, anticipated duration of services, objective evaluation criteria, evaluation procedures and at least annual evaluation schedules-§1401(19)	defined-§300.340 required by 10/1/77-§300.342(a) required before special ed starts-§300.342(b) P.E. included in all programs-§300.307 meetings to develop IEP §§300.343-.345,347-.348 parent participation-§§300.344(c)(3), 300.345 IEP accountability-§300.349	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	designed to meet individual educational needs of handicapped persons as adequately as needs of non-handicapped are met-IEP one way to do this-§104.33(b)	written habilitation plan containing long-term habilitation goals and specific intermediate habilitation objectives stated in behavioral or other terms that provide measurable indices of progress-must describe how objectives will be achieved; barriers which might interfere with their achievements; schedule, procedures, and criteria to determine if objectives met; program coordinator responsible for implementation of plan must be designated; describe roles of services agencies involved; list initiation and projected duration of each service-§6011(b)	individualized services-§1386.48, §1386.52 individualized habilitation plans-§1386.52	

PLACEMENT AND PROGRAMMING

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	**P.L. 94-142 Regulations 34 C.F.R. Part 300**	**§504 Rehabilitation Act of 1973, 29 U.S.C. §794**	**§504 Regulations 34 C.F.R. Part 104**	**DD Act 42 U.S.C.§6000 *et seq.***	**DD Regulations 45 C.F.R. Part 1385 (Proposed, 45 Fed. Reg. 31006, May 9, 1980)**	**Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B**
INDIVIDUAL PROGRAM REVIEW	annual review required at minimum-§1414(a)(5)	annual review required-§300.343(d)	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	periodic re-evaluations required-§104.35(d)	annual review required-§6011(a), §6011(c) parent, guardian, or other representative participate in annual review-§6011(c)	annual review-§1386.52(b)(10)	
RELATED SERVICES	supportive services as may be needed for student to benefit from special education — includes early identification and assessment of handicaps-§1401(17)	transportation and other such developmental, corrective, and other supportive services required to assist student to benefit from special education-§300.13		part of appropriate education when designed to meet individual educational needs of handicapped-§104.33(b)	right to treatment, services, habilitation, nourishing diet, medical and dental services-§§6010(2),6010(3)(B), 6010(4), 6001(8)		need for related services can't bar admission of handicapped to programs-§IV.N interpreter services for counseling deaf students required-§V.D
TRANSPORTATION	may be required to assist handicapped child to benefit from education-§1401(17)	defined as part of "related services" mandated-§300.13(b)(13) can be included as part of child's IEP-§300.346(c)		at no greater cost to parents than for non-handicapped-§104.33(c)(2)			

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PROCEDURAL DUE PROCESS PROTECTIONS

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	**P.L.94-142 Regulations 34 C.F.R. Part 300**	**§504 Rehabilitation Act of 1973, 29 U.S.C. §794**	**§504 Regulations 34 C.F.R. Part 104**	**DD Act 42 U.S.C.§6000 *et seq.***	**DD Regulations 45 C.F.R. Part 1385 (Proposed 45 Fed. Reg. 31006, May 9, 1980)**	**Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B**
COMPLIANCE MONITORING BY STATE & FEDERAL AGENCIES	state assures compliance by all agencies-§1412, §1413	state assures compliance by all agencies-§300.2, §300.360, §300.600-.653	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	federal compliance monitoring-§104.61		state planning council monitors implementation of state plan-§1386.32(a)(2) federal compliance hearings-§1386.80-.112 evaluation of personnell providing services-§1386.49, §1386.51	
HEARINGS	whenever complaint received-§1415(b)(2) hearing rights-§1415(d)	when-§300.506, .504(c) hearing rights-§300.508 impartial hearing officer-§300.507 timelines-§300.512		right to impartial hearing-§104.36			

PROCEDURAL DUE PROCESS PROTECTIONS

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C.§6000 *et seq.*	DD Regulations 45 C.F.R. Part 1385 (Proposed, 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
ADMINISTRATIVE APPEALS	impartial review-§1415(c)	impartial review-§300.509, §.510 timelines-§300.512		right to review-§104.36 see procedures for Title VI, Civil Rights Act of 1964			
NOTICE	written prior notice in native language when initiating, changing, or refusing to: identify, evaluate, place, or provide free appropriate public evaluation-§1415(b)(1)(C)and(D)	when-§300.504(a) content and form-§300.505	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."	whenever action taken regarding identification, evaluation, or educational placement-§104.36 notice of non-discrimination-§104.8			
CONSENT		defined-§300.500 prior to placement evaluation and initial placement in special ed-§300.504(b) procedures when parent refuses-§300.504(c)					
SURROGATES	assignment of surrogate when parent/guardian unknown, unavailable or child a state ward-§1415(b)(1)(B)	when-§300.514(a) criteria for selection-§300.514(c) and (d) responsibilities §300.514(e)					

PROCEDURAL DUE PROCESS PROTECTIONS

	P.L. 94-142 20 U.S.C. §§1401 *et seq.*	P.L. 94-142 Regulations 34 C.F.R. Part 300	§504 Rehabilitation Act of 1973, 29 U.S.C. §794	§504 Regulations 34 C.F.R. Part 104	DD Act 42 U.S.C.§6000 *et seq.*	DD Regulations 45 C.F.R. Part 1385 (Proposed, 45 Fed. Reg. 31006, May 9, 1980)	Vocational Education Guidelines 34 C.F.R. Parts 100 and 101 Appendix B
ACCESS TO RECORDS/ CONFIDENTIALITY	examine records-§1415(b)(1)(A) (See also Buckley Amend., 20 U.S.C. §1232g)	right to examine records re identification, evaluation, placement, FAPE-§300.502 definitions-§300.506,.500 consent to release-§300.571 access rights-§300.562 notice of rights-§300.561 amendments-§300.567 hearings-§§300.568-.570	"No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."				
GRIEVANCE PROCEDURES				adoption of grievance procedures required for all recipients employing 15 or more persons for complaints alleging any action prohibited by Part 84 (except re postsecondary admission)§104.7			

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CHAPTER 2
STUDENTS WITH HANDICAPPING CONDITIONS: CHARACTERISTICS AND NEEDS

2.1 INTRODUCTION

The various state and federal statutes and regulations relating to the education of the handicapped cover different handicapping conditions. One must know the definitions of the terms employed in order to determine what types of legal protections are available to a handicapped student. Knowing the definitions, moreover, better enables one to communicate with educators and evaluators, most of whom tend to rely on labels rather than on more accurate, detailed, and lengthy descriptions of individual strengths and weaknesses.

The tendency of educators to be bound by past practices and by the labels identifying handicapping conditions illustrates a major problem in special education and in Public Law No. 94-142. Many of the difficulties in providing appropriate educational services to handicapped students are directly linked to the failure to tailor educational programs to meet individual needs. In the past, once a label — such as "educable mentally retarded" — was attached to a student, the educational treatment the student was to receive was determined solely by the label. All educable mentally retarded (EMR) students were placed in EMR classes in which all the students were subjected to a uniform EMR curriculum. Present laws prohibit the use of a single criterion to determine an appropriate educational placement for a child.

Although one congressional goal of both Public Law No. 94-142 and Section 504 was to end the stigmatization of handicapped persons, Public Law No. 94-142 has done little to solve the problem and, in fact, fosters it. Both Public Law No. 94-142 and its implementing regulations continue to use rigid categories and labels to denote which handicapping conditions are covered by the law. The emphasis on individualization throughout the rest of Public Law No. 94-142 and its implementing regulations, however, is convincing evidence that Congress intended that labels only be used to determine whom the law covers. Once coverage is determined, the labels identifying handicapping conditions are useless and must be dropped to ensure that programs and services are individualized.

The label applied to a handicapping condition is only important in three very limited instances:

- In determining whether a student is eligible for coverage under a particular state or federal law (particularly Public Law No. 94-142);[1]
- In counting students for reporting purposes under state or federal requirements;[2] or
- In determining, for people between the ages 3 through 5 or 18 through 21, whether they are entitled to free, appropriate public education.[3]

Aside from these circumstances, any label identifying a disability or handicapping condition should be avoided.

This chapter defines categories of handicapping conditions and describes the typical educational needs of the group of students who fall within each category. This information should enable advocates to understand terminology used in the education of the handicapped and to assess, in a very general way, proposals concerning the educational program and services offered to an individual student. The information here is only a generalization, however, and all decisions concerning the evaluation, placement, and programming of a student must be made on an individual basis.

2.2 MENTAL RETARDATION

> "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period which adversely affects a child's educational performance.[4]

2.2.1 SYMPTOMS OF MENTAL RETARDATION

Mental retardation is generally described via two categories: students who are mildly impaired, often referred as "educable mentally retarded" (EMR); and those who are more severely impaired, often referred to as "trainable mentally retarded" (TMR). One cannot strictly differentiate the two conditions; the categories overlap, and strict differentiation between categories of mental retardation is not necessary under Public Law No. 94-142, which applies to all forms of mental retardation. Included within the definition of mental retardation is a broad range of conditions. Students who are totally dependent because of severe or profound retardation are included, as are those who suffer only mild impairment. Those who are simply slow learners are not. The following summary illustrates well the nature of the different levels of impairment referred to as mental retardation.

The characteristics of mild mental or "educable" retardation are:

- Ability to develop as an independently functioning adult;
- Slight social and emotional immaturity;

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[1] 20 U.S.C. §§ 1401(1), (15); 34 C.F.R. § 300.5; 29 U.S.C. § 701; 34 C.F.R. § 104.3(j); 42 U.S.C. § 6001(7); 45 C.F.R. § 1385.2(6).

[2] 34 C.F.R. §§ 300.750-.754.

[3] 20 U.S.C. § 1412(2)(B); 34 C.F.R. §§ 300.122, .300.

[4] 34 C.F.R. § 300.5(b)(4).

- Below average performance on verbal and nonverbal intelligence tests;
- Slowed development of memory, language ability, conceptual and perceptual ability, and creativity;
- Significant delay in acquiring readiness skills for learning to read, write, spell, and perform arithmetic;
- Short attention span and poor concentration;
- Low tolerance for frustration;
- Higher-than-average incidence of visual, hearing, and motor coordinative problems;
- Nutritional or health problems; and
- In cases of organically-caused retardation, physical abnormalities (such as large head size in Down's Syndrome).

The characteristics of severe or "trainable" mental retardation are:

- Need for partial or total supervision in adult life;
- Intellectual development at the rate of one-third to one-half or still less of that shown by non-retarded individuals;
- Serious difficulty in motor coordination;
- Distinct physical symptoms, such as hydrocephalis (the accumulation of excessive amounts of "water," or cerebrospinal fluid on the brain, leading to either large brain size or increased cranial pressure), cerebral palsy, epilepsy, damage from previous brain infections (such as meningitis or encephalitis), cretinism (seriously impaired thyroid functioning), microcephaly (extremely small head); and
- In approximately one-half of the cases of severe retardation, another major handicap.

Diagnoses of mental retardation are usually tied to performance on intelligence tests. Most often, children who are described as educable mentally retarded are not identified until they begin to lag significantly behind other students in school. Individuals with more serious retardation are usually identified in the preschool years based on clinically identifiable symptoms, such as Down's Syndrome, or significant delays in learning to walk or talk.

The widespread use of standardized intelligence test scores to diagnose and classify mental retardation creates many problems. A single total performance score on an intelligence test does not describe a student sufficiently for planning an appropriate educational program. The student may have a wide range of abilities, strengths, and weaknesses in the areas such a test covers. The test, which may accurately measure present levels of achievement may reflect inaccurately a student's potential. This argument is supported by evidence of variable rates of intellectual development in the general population.[5]

Intelligence test scores are based upon a theoretical presumption that intelligence is distributed among the total population in a consistent manner such that a graph of intelligence indicators for the whole population will always follow a bell-shaped or normal distribution curve.[6] Therefore, a percentage of the total population is always by definition "retarded."

A more serious problem in using standardized intelligence tests to classify students as mentally retarded is the resulting widespread misclassification of minority and low socioeconomic status children.[7] Nationwide, there are proportionately higher numbers of minority students enrolled in classes for the mentally retarded than there are minority students in the total school population. In many school districts, minority students constitute less than 20% of the total school population, and yet account for well over fifty percent of the enrollment in classes for the mentally retarded.[8]

For years, educators and psychologists have debated the extent to which measured intelligence is the result of inherited and environmental factors.[9] The argument has included disputes over whether minority children, specifically black children, have, as a group, significantly lower inherited intelligence than the rest of the population. Some charge that cultural bias is inherent in the standardized tests used to assess children.[10] Both the laws and most educators now recognize that performance on a standardized intelligence test should not stand alone as the sole criterion for a diagnosis of mental retardation. While intelligence tests tend not to give a full and fair indication of any person's capabilities, the problem is especially pronounced in evaluation of the retarded. Assessments of a retarded student's "adaptive behavior," which are designed to measure a student's functioning in real life situations, offer a better picture of that individual's capabilities than does an intelligence test. At the preschool level, assessments, of adaptive behavior focus on a child's sensory and motor development, self-help skills, and communication skills. For older students, adaptive behavior assessments address educational achievement, ability to apply what has been learned, maturity, interaction with peers, and ability to function in settings outside the school. For adults, assessments of adaptive behavior include scrutiny of an individual's social and economic adjustment.

The implementing regulations under Public Law No. 94-142 and the Section 504 regulations both require that all evaluations be multifaceted.[11] This alone suffices to prohibit exclusive reliance upon an intelligence test score as the indicator of mental retardation. In addition, however, the Public Law No. 94-142 regulations define mental retardation as subaverage intellectual functioning coupled with deficits in adaptive behavior.[12]

An assessment of adaptive behavior is particularly important in the case of a student of low socioeconomic status or minority cultural background. Standardized intelligence tests and the entire referral and evaluation process are heavily skewed against such a youngster. Assessments of adaptive behavior afford an opportunity to counterbalance this bias, particularly when the assessment is undertaken by someone familiar and sympathetic with the student's sociocultural background.

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[5] *See* § 3.9 *infra*.

[6] A "normal distribution" is a frequency distribution, a graph of which is symmetrical and bell-shaped. When a group of intelligence test scores from the general population is graphed, for example, the largest number of scores clusters together in the center of the range, with the numbers of students obtaining each score dropping off rapidly in both directions as the graph progresses toward the highest and lowest scores.

[7] *Id.*

[8] *See* § 3.9 *infra*.

[9] *See, e.g.*, L. KAMIN, THE SCIENCE AND POLITICS OF I.Q. (1974).

[10] *Id.*

[11] 20 U.S.C. § 1412(5)(c); 34 C.F.R. § 300.532(b)-(f); 34 C.F.R. § 104.35(b)(2).

[12] 34 C.F.R. § 300.5(4).

Any of several factors can cause mental retardation. The origins of most retardation are unknown, but a number of genetic irregularities are recognized as producing biochemical disorders that result in mental retardation. Metabolic dysfunctions are the usual source of such disorders. Phenylketonuria (PKU) is an inherited metabolic dysfunction causing retardation through an abnormality in the body's amino acid metabolic functioning (amino acids are essential components of proteins). PKU can be diagnosed in infancy through urinalysis; PKU testing of newborns is required by law in many states. A special diet can minimize or prevent the harmful effects of PKU on the brain; retardation may be prevented. Chromosomal abnormalities can also result in retardation. The most typical such abnormality is Down's Syndrome (once known as "mongolism," due to the characteristic slanted appearance of the eyes of its victims). Down's Syndrome involves a chromosomal abnormality resulting from an extra, broken, or translocated chromosome. Mental retardation can also result from prenatal problems during pregnancy: Rubella (German measles) during the first three months of pregnancy, drug or alcohol abuse, venereal disease, poor nutrition, or blood incompatability between the mother and her fetus. Conditions arising during or immediately after birth, such as brain injury, lack of oxygen, prematurity, or such conditions occurring in early childhood as encephalitis, a viral inflammation of the central nervous system, may also result in retardation.

Many commentators suggest that some forms of retardation result from so-called "deprivation" in childhood. A home and family environment in which there are not high levels of parent-child interaction, sufficient nutrition and health care, and positive informal learning opportunities can result in developmental delay and slowed educational achievement. Students suffering from deprivation at home may therefore need supplemental educational help. This is the premise behind federally sponsored preschool Head Start or Title I training programs.[13] Once in school, these students will probably need compensatory and remedial education.

Whether or not special education and the label "handicapped" are appropriate for a disadvantaged student is problematical. Because of the severe stigmatization which usually results from the label "handicapped," the disadvantaged student probably should not be classified as handicapped and in need of special education. However, without such a classification, in many school districts it will not be possible for the child to obtain appropriate compensatory educational programs and services. The problem, therefore, becomes one of balancing needs and interests on an individual basis; the ultimate decision should be left to the individual student and the parents or guardian.

2.2.2 EDUCATING STUDENTS WHO ARE MENTALLY RETARDED

The goal of an educational program for a retarded student should be to maximize the student's chances for achieving self-sufficiency. For a mildly retarded student, this means preparation for an adult life in which the individual is incorporated into the society and is successful vocationally, socially, and personally. Many retarded students have achieved this goal. For more severely impaired students, the goal must be to promote as much progress toward self-sufficiency as is possible. A good program can increase an individual's sense of self-worth and diminish his/her dependence on social and governmental services.[14]

Early intervention with retarded children can significantly increase their potential achievements in both academic and social areas. Some social service agencies provide home intervention and infant stimulation programs, in which teachers or other specialists visit the home to spend time with retarded children and to advise parents. These programs have demonstrated that significant gains in "measured intelligence" can be achieved. Such programs are rare and are usually unavailable through the schools. Most are provided by social service agencies, such as county and state extension services and mental health and mental retardation commissions.

Project Head Start programs recognize the importance of the early years of child development and emphasize preschool programs for the handicapped.[15] Such preschool and kindergarten programs for retarded children produce significant gains, particularly when the programs afford the handicapped frequent opportunities for contact with their nonhandicapped peers.

Expectations inherent in a handicapped child's environment can foster intellectual growth and social and emotional maturity. Such an environment would offer nurture, acceptance, and both intellectual and social stimulation.

Most American public schools offer special education programs in separate "segregated" classes in which the handicapped students are placed in classrooms or buildings isolated from their nonhandicapped peers. However, many students who are in the trainable category are "institutionalized," that is, placed in residential institutions; students with severe and profound intellectual impairments are almost always placed in residential institutions. Note, however, that many, if not most, of these practices violate the statutory requirement for education in the "least restrictive environment."[16]

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[13] Head Start Programs are conducted pursuant to 42 U.S.C. §§ 2928 *et seq*. and 45 C.F.R. Parts 1301-1305 (*see* § 4.12.1 *infra*). Title I programs are operated to provide compensatory educational services to educationally disadvantaged students. 20 U.S.C. §§ 2701 *et seq*; 34 C.F.R. Parts 200, 201. This program is now Chapter 1 of the Education Consolidation and Improvement Act.

[14] Research indicates that the investment in special educational programs and services for young people is more than paid off when those individuals achieve any degree of self-sufficiency since they place fewer demands on the social service system. *See* R. CONLEY, THE ECONOMICS OF MENTAL RETARDATION (1973).

[15] *See* § 4.12.1 *infra*.

Teachers who are not trained in special education but who work in classrooms that include some retarded students should be assisted and supported by specially trained teachers and consultants who are experts in the education of retarded students. In addition, these regular class teachers should receive some in-service training in this area. Finally, it is important to have the regular class teacher participate in the IEP team planning meetings which formulate the individualized education programs for the handicapped students (s)he teaches.[17]

Curricular and instructional objectives for mildly retarded students should not differ significantly from those for "regular" students; the pace of instruction, however, should be slower and a shift in emphasis may be desirable. In particular, the program should focus on concrete, rather than abstract, teaching materials and techniques. Instruction should be carefully programmed and sequential.

Retarded students, as is the case for all handicapped students, have a greater need to experience success and positive feedback or reinforcement than other students do. Retarded students have a high expectation of failure, an expectation learned in part from the way much of society treats them.

Acquisition of vocational skills is also highly important for mildly or moderately retarded students. Junior high and high school work-study programs provide one means of achieving this goal. In addition, "sheltered workshops" run by public or voluntary agencies provide vocational training as well as real-life vocational opportunities. Sheltered workshops offer training and work in such areas as piecework, packaging, and simple assembly; the workshops are run expressly for the handicapped and are not generally profit-making. Some workshop employees are handicapped individuals who are permanent members of the workforce and who receive wages. Other workers are unpaid students placed in the workshop to learn skills which they will then use in regular jobs.

For severely retarded individuals, educational programs emphasize self-help skills, such as personal hygiene, dressing, eating, socialization, and homemaking. Severely retarded individuals do not usually learn to read beyond the first grade level and learn only a few arithmetic concepts. Recognition of simple and critical words, such as "exit," "men," "women," and "walk," is a learnable skill for most.

Consistent with the legal mandates for placement in the least restrictive environment,[18] many retarded individuals, many of whom were never offered educational programs in the past, are being removed from segregated institutions and placed back in their communities. Often, for older youths and adults, this placement is in a group home in which a small number of handicapped individuals live together in a family-like setting with several adult caretakers. Residents leave the group home to attend school or to work in a sheltered workshop.

2.3 HEARING IMPAIRMENTS

> "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.[19]
> "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance, but which is not included under the definition of "deaf" in this section.[20]

2.3.1 SYMPTOMS OF HEARING IMPAIRMENTS

Education of the deaf and hearing impaired is the most difficult technical field within special education. Treatment of the deaf is very different from treatment of the hard-of-hearing or hearing impaired, but symptoms and diagnoses of the two handicaps are similar.

The symptoms of deafness are:

- Response to some loud sounds, but general unawareness of sound;
- Reliance on vision rather than hearing as primary avenue for communication;
- Retarded speech and linguistic development;
- Significant lag in educational achievement; and/or
- Poor performance on verbal indicators of intelligence.

The symptoms of hearing impairments are:

- Chronic inattention;
- Frequent failure to respond when spoken to;
- Difficulty hearing faint or distant speech;
- Marked developmental delay in learning to talk or unusually faulty articulation;
- Lower academic achievement than would be expected, given academic potential; and/or
- Difficulty in language arts subjects, such as spelling and vocabulary.

Many of the symptoms of hearing impairment are also symptoms of other handicapping conditions and, in cases where there are no visible physical problems with the ear, many hearing defects go undetected by parents and teachers. Auditory screening of all children and particularly of those children having educational difficulties of undetermined cause is imperative.

While there are several methods for measuring hearing ability, the most accurate and common method is testing with an electronic pure-tone audiometer. This method is used in most schools both for screening large groups of students (*e.g.*, all third and sixth graders) and for conducting individual evaluations of students referred by school personnel or identified during the mass screening. The audiometer produces, through earphones, pure tones of known frequency and intensity. The subject being tested indicates when s(he) hears the tones and an "audiogram" is plotted for each ear to represent the frequencies the student can hear. Hearing acuity can be accurately evaluated with an audiometer, except with very young, severely retarded, or seriously emotionally disturbed children. If a hearing impairment is detected, the student should be referred to an otologist, a physician specializing in treatment of the ear, for a medical evaluation of the hearing problem. Proper diagnosis and treatment are highly technical.

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[16] *See* § 4.6 *infra*.
[17] *See* § 4.2.3 *infra*.
[18] *See* § 4.6 *infra*.

[19] 34 C.F.R. § 300.5(b)(1).
[20] *Id.* § 300.5(b)(3).

In more than one-third of the cases involving hearing impairment or deafness, the cause of the handicap cannot be exactly determined. Hearing impairments or deafness may result from:

- Prenatal infections or toxic conditions in the mother, such as mumps, flu, or German measles (Rubella) in early pregnancy;
- Birth defects of unknown cause or due to genetic history;
- Traumatic birth and delivery or lack of oxygen prior to or during birth;
- Blood incompatability between mother and fetus;
- Childhood diseases, such as meningitis or ear infections, especially recurrent ear infections, or acute fever;
- Otosclerosis, the abnormal formation of spongy bone tissue in the middle ear, occurring occasionally at the prenatal stage but usually appearing later in life;
- Accidents, such as concussions;
- Brain tumors, cerebral hemmorhage;
- Adverse reaction to certain antibiotics; or
- Psychological or emotional factors, which cause what is termed "psychogenic deafness" (this term is sometimes also used to refer to cortical deafness, which results from a defect or impairment of the cortex of the brain).

Despite the many and varied sources of hearing defects, all hearing problems other than psychogenic deafness, are of two main types: conductive, and sensory-neural (perceptive). In conductive hearing losses, the intensity of sound reaching the inner ear, where the auditory nerve to the brain begins, is reduced due to an obstruction resulting from such factors as bone malformation. Surgical procedures can sometimes correct a conductive loss. Conductive loss usually results only in hearing impairment, not deafness or eardrum damage. Sensory-neural or perceptive hearing losses are caused by defects of the inner ear or of the auditory nerve itself; the hearing loss may be partial or complete. Surgery usually cannot correct sensory-neural impairments, and hearing aids are less likely to compensate for sensory-neural losses than for conductive losses.

2.3.2 EDUCATING STUDENTS WHO ARE HEARING IMPAIRED

The hearing impaired were once educated in totally segregated classes or facilities. New types of hearing aids have since become available, and it is now widely recognized that such students should be exposed to the spoken language. A hearing impaired youngster learns better in a regular classroom with a regular classroom teacher than in a segregated setting. Special assistance for both student and teacher makes integration workable.

Because of the low incidence of this type of handicap, an itinerant teaching model is used. The student participates in the regular program for most of the school day, and a teacher expert in the education of the hearing impaired travels from school to school. The itinerant teacher advises classroom teachers and conducts individual or small group sessions with hearing impaired students. These sessions include auditory training, training and counseling in the use of hearing aids, training in lip reading, and speech correction.

Auditory training teaches the student to listen for auditory clues and to discriminate between different sounds. Such training should begin at an early age. Lip reading, sometimes called speech reading, is an effort to understand others by observing their facial and lip movements. There are various methods of teaching lip reading. Unfortunately, no one can understand, through lip reading alone, more than a small portion of what is said. Speech correction helps students overcome abnormalities in speaking and problems in voice quality. It also trains them to include omitted sounds and to exclude added sounds in words. Training and counseling on the use and care of hearing aids gradually enables students to use hearing aids. Students, particularly the very young, need such training since one cannot simply insert and immediately use an aid.

2.3.3 EDUCATING STUDENTS WHO ARE DEAF

The education of deaf children centers on developing linguistic and communicative skills. The goal is to teach the student to read, write, and understand English. There are two primary methods to educate the deaf: oralism and manualism. The oral method employs speech and lip reading. It is sometimes called the "oral-aural" method because it emphasizes using any residual hearing the student may possess. The manual method stresses the use of sign language and finger spelling.

From these two primary teaching methods has grown a number of alternative educational approaches. The combined, or Rochester, method relies upon the oral method in combination with concurrent finger spelling near the face. "Total communication," currently popular, involves the simultaneous use of sign and speech; it incorporates oral, manual, and aural modes of communication.

Methods for educating the deaf are numerous and varied; they are described above in relatively broad terms. In part, variations arise because there is no universal, standardized system of sign language or deaf communication. Most sign language systems in the United States use the basic vocabulary of the American Sign Language (ASL). ASL, however, is more than a vocabulary; it has a formal linguistic structure distinct from that of English. It has, for example, its own semantic and syntactic rules and idioms. ASL involves minimal use of finger spelling.

Sign English (Siglish), another system of communication for the deaf, is based upon ASL but seeks to approximate the word order and syntax of English, through greater use of finger spelling and, often, through simultaneous speech. Most deaf adults in this country who have proficiency in both English and ASL use Siglish to communicate.

There are several systems of Manual English based largely upon ASL signs but which also use new and modified signs to reproduce English morphology in visual form. Some deaf educators also refer to "childrenese": ad hoc, short-lived signs used by deaf children, much like baby talk.

Many deaf children can learn to speak, even though some, for any number of reasons, never acquire it. Profoundly deaf children, who have no residual hearing, learn to speak by learning to reproduce what they see and feel on the lips, faces, and throats of people who talk to them. Students watch and feel vibrations and then imitate them, often while watching themselves in a mirror.

Linguistic development is the critical problem for deaf and severely hearing impaired children. Most of these children develop linguistic skills through reading and experience. Because linguistic development is a particular problem for the deaf children, they generally lag behind others their own age and often receive lower intelligence test scores than are warranted.[21]

The nature of language training aside, the appropriate educational setting for deaf students is debated throughout the community of both the educators and the parents of deaf and severely hearing impaired youngsters. Deaf students have traditionally been educated in segregated, usually residential settings. This has been considered necessary because of the low incidence of the condition, the high level of expertise required of teachers, and the intensity of the training students need. Some commentators have estimated that few deaf children would benefit from mainstreaming,[22] but the issue is highly controversial. Recent experience indicates that most deaf students, including the severely hearing impaired, can more successfully participate in the regular school setting than was previously thought possible. Gradual integration following intensive special education is a particularly successful way to move these students into the least restrictive educational environment that is responsive to their individual needs.

In addition to the linguistic and communicative difficulties of deaf students, research indicates that deaf children are often less successful than hearing children in visual-perceptual tasks, especially those required on reading readiness tests, such as the Frostig Developmental Test of Visual Perception and the Illinois Test of Psycholinguistic Abilities.[23] Much of this difficulty may be attributed to deaf students' limited learning experiences. Because most deaf students have little verbal ability and hence lack verbal skills to use in problem-solving, they often exhibit poor memory and achieve less than their peers academically. With proper training, however, they may overcome these difficulties. One can easily underestimate deaf students' ability to do so, unfortunately, since intelligence tests which rely heavily upon verbal language as opposed to sign language produce low scores for deaf children, even for those of high cognitive ability.[24] Similarly, educational programs emphasizing linguistic skills hinder deaf students who cannot easily achieve cognitive development through a verbal mode.

Deaf children experience difficulty developing in another way too. They are frequently regarded as being immature emotionally, and they often are, particularly those children from families or educational settings which do not encourage independence.

In addition to auditory and speech reading training and training in some form of sign language, deaf students may need speech developmental and corrective services and training in linguistic development. Since the deaf acquire reading skills slowly, they also need intensive training in reading. And, of course, deaf students should study mathematics, spelling, writing, literature, and the social and physical sciences. Captioned films and television are available to supplement regular texts and teaching materials.

In the education of both hearing impaired and deaf students, the full participation of the family is critical. The deaf or hearing impaired child should receive continuous exposure to speech and should be praised for responding to sounds and for communicating. Good training at home from the earliest years is crucial. When a student must learn a sign communications system, his/her family should learn it too and should diligently practice it with the student at home.

Several post-secondary educational opportunities are tailored to meet deaf students' needs. The federal government has provided financial support to Gallaudet College for the Deaf in Washington, D.C., which has offered both undergraduate and graduate level academic training since 1864. The National Technical Institute for the Deaf in Rochester, New York, has also received federal funds; it provides vocational and technical programs. In addition, the federal government has sponsored special community college programs for the deaf. Finally, many deaf young adults participate in special education and vocational or technical training programs offered by federally funded state and local vocational rehabilitation programs.

2.4 SPEECH IMPAIRMENTS

> "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.[25]

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[21] *See* SURAN, SPECIAL CHILDREN: AN INTEGRATIVE APPROACH 120-22 (1979).

[22] *See* M. REYNOLDS, TEACHING EXCEPTIONAL CHILDREN IN ALL AMERICA'S SCHOOLS 522-25 (1977).

[23] *See* App. 3E *infra*.

[24] *See* § 3.8.1 *infra* (evaluation bias on the basis of handicapping condition).

[25] 34 C.F.R. § 300.5(b)(10).

2.4.1 SYMPTOMS OF SPEECH IMPAIRMENTS

Speech impairments are of several types. Unless there is an organic basis for a student's speech impairment, the difficulty may be a temporary one rather than a true handicapping condition. Many children go through a period of stuttering or stammering that they outgrow; many speech problems are resolved without intervention. The unusually high incidence of speech impairment among students in the first grade reflects this. If, however, a student's speech problems persist or are accompanied by medical or dental difficulties, the student may have a true handicapping condition and may require special education programs. Such a speech problem may delay educational achievement in all areas.

Speech impairments usually relate to one or more of the following:

- Articulation;
- Vocal quality;
- Vocal pitch;
- Vocal intensity or volume;
- Stuttering or stammering;
- Rate of speech;
- Aphasia;
- Delayed speech development; and/or
- Cleft lip and/or cleft palate.

Articulation problems are the most common kind of speech impairment. Articulation problems involve substitutions, distortions, omissions, and additions of sounds. Lisping and lallation (the distortion of "r" and "l" sounds, also called "lalling") are common articulation problems. Articulation problems may result from either organic or learning deficiencies. The causes of most articulation problems are not easily identified. It is considered more effective to eliminate the problem itself than to try to identify and remedy its root cause.

Children often outgrow problems of vocal quality, pitch, and intensity. Impairments of vocal quality involve incorrect intonation or speech which is harsh, nasal, or breathy. Problems in vocal pitch often pass with time; the size of the larynx and the rest of the body begin to correspond more closely.

Stuttering also frequently self-corrects over time. Theories differ as to whether the problem is rooted in organic, psychological, emotional, or educational needs. Many more boys than girls suffer from the impairment. Anxiety, excitement, and feelings of low self-confidence seem to provoke and increase the severity of stuttering. In turn, stuttering causes tenseness, low self-concept, and emotional withdrawal. The stutterer needs his/her teacher, family, and peers to accept him/her, and this may be a major factor to take into consideration in developing an educational program.

Somewhat different from stuttering, but often confused with it, are problems relating to the rate of speech. "Cluttering" (fast, erratic, slurred, or garbled speech) is a common problem. "Aphasia," another speech problem, is generally evidenced by an inability to produce or comprehend language. It is associated with cerebral dysfunction and results most often from a brain injury or trauma. The same symptoms, however, can be congenital and appear in earliest childhood; the terms "developmental," "congenital," and "childhood aphasia" all refer to a congenital inability to learn language.

"Delayed speech development" refers, usually, to retarded acquisition of normal patterns of speech and language.

Speech problems are frequently associated with other handicapping conditions. The most obvious cases are those of students with serious hearing impairments. For the hearing impaired, problems in speech or language acquisition (primarily voice and articulation) are linked to the student's inability to hear his/her own voice or the voices of others. Students suffering from cerebral palsy may have speech which is slow, slurred, and difficult to understand. Cerebral palsy, a brain dysfunction resulting in motor impairments is exhibited in different forms and intensities. Delayed speech and linguistic development is a prominent characteristic of mental retardation; speech impairments are more prevalent among the mentally retarded than among the rest of the population. The severity of the speech impairment usually relates directly to the severity of the mental retardation.

Medical personnel may be needed to diagnose and treat speech impairments properly. Often an otolaryngologist, a medical doctor specializing in problems of the ear, nose, and throat, must be consulted. Speech impairments may result from tumors on the larynx or esophagus, muscular problems, breathing difficulties, and abnormalities of the tongue, lips, palate, nose, or mouth. A dentist or orthodontist may be required to correct speech difficulties induced by improper tooth placement or formation.

Cleft lips or cleft palates usually impair speech. Such defects occur in the early stages of pregnancy; the bone and tissue of the lips or palate fail to fuse. A number of problems, cosmetic and otherwise, may also result. Plastic surgery can correct many of the physical problems and most of the cosmetic problems, but some may remain, resulting in emotional and social side effects. Dental irregularities, tongue deformities, and respiratory problems may accompany cleft lip or cleft palate; dental prostheses can alleviate some of those difficulties.

Secondary social problems often accompany speech impairments. Speech difficulties frequently evoke negative reactions from those who must deal with the student. A speech problem may lead people to label a student "slow," "retarded," "crazy," or "immature." The resultant stigmatization is obvious. Many speech impaired students feel tense, withdraw, or suffer other emotional difficulties because of their impairment. Efforts to increase the student's self-confidence may be a necessary part of his/her educational program.

2.4.2 EDUCATING STUDENTS WHO ARE SPEECH IMPAIRED

Individualization of programming is critically important in overcoming speech impairments. Typically, a speech impaired student attends special sessions of from 15 to 30 minutes each from 1 to 5 times each week. Usually, each session involves a single student working with a speech-language pathologist (or clinician) or with a specially trained aide supervised directly by a clinician. This form of direct therapy is rarely initiated before the upper elementary school years unless the student's problem is severe. At all grade levels, however, attention to speech needs should be provided in all components of a student's program.

Speech impaired students greatly need continual feedback and reinforcement from those at school and at home. The speech clinician should, therefore, not just provide individual therapy but should also consult regularly with parents, teachers, and other school personnel. The speech clinician can use such meetings to coordinate outside efforts to reinforce the skills learned in therapy.

2.5 SPECIFIC LEARNING DISABILITIES

> "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantages.[26]

2.5.1 SYMPTOMS OF SPECIFIC LEARNING DISABILITIES

There is great dispute about the definition, diagnosis and treatment of specific learning disabilities. Pediatricians, nutritionists, psychiatrists, clinical and educational psychologists, opthamologists, optometrists, neurologists, audiologists, otologists, as well as special educators are all involved in the diagnosis and treatment of learning disabilities. The diversity of this group reflects the diversity of the problems labeled "learning disabilities."

The characteristics of specific learning disabilities are:

- Significant discrepancies between intellectual potential and achievement;
- Variations in development or achievement in different skill areas;
- Disorders in thinking, conceptualization, memory, speech, language, attention, perception, emotional behavior, or coordination; and
- Symptoms such as ambidextrousness, brain damage or dysfunction, clumsiness, difficulty telling time, difficulty performing motor tasks (*e.g.*, tying one's shoes), inattention, poor memory, hyperactivity, poor spelling, poor handwriting, prenatal or delivery difficulty, illness or high fever in early childhood, poor eye-muscle coordination, poor visual-motor coordination, visual problems, auditory-perceptual problems.

There are many and varied types of learning disabilities. The reader should find useful the following descriptions[27] of several specific learning disabilities:

> *Acalculia*. Inability to process arithmetic symbols; inability to comprehend the abstract concepts represented by concrete numerals; inability to relate concepts to number symbols.
>
> *Agnosia*. Inability to recall specific sound-symbol relationships; inability to remember concepts or to recall the concepts represented by letter forms, whole words, or other language units.
>
> *Agraphia*. Inability to encode in written form; inability to remember how to write alphabet symbols; inability to write legibly even when specific symbols are clearly in view.
>
> *Alexia*. Inability to decode printed word symbols; inability to read after considerable exposure to educational techniques for teaching reading.
>
> *Anoxia*. Temporary loss of oxygen in important centers of the brain; usually results in brain damage which may cause learning difficulties.
>
> *Aphasia*. Inability to use language coherently or meaningfully; inability to correlate concepts with word symbols, or to recall concepts represented by word units.
>
> *Auditory Dyslexia*. Difficulty encoding (translating) speech into printed or written symbols; difficulty identifying ("hearing") discrete phonic elements of speech accurately; difficulty making sound-symbol associations.
>
> *Bradyslexia*. Extremely slow rate of reading, writing, or spelling.
>
> *Dyscalculia*. Difficulty learning to process arithmetic symbols; partial ability (or inability) to comprehend the relationships between math concepts and symbols.
>
> *Dysgnosia*. Difficulty remembering specific concept-symbol relationships; partial ability (or inability) to remember which concepts are represented by specific symbols.
>
> *Dysgraphia*. Difficulty putting thoughts into written form; partial ability (or inability) to remember how to make certain alphabet or arithmetic symbols in handwriting; involves faulty sense of directionality (left to right; top to bottom).
>
> *Dyslexia*. Difficulty processing language symbols; partial ability (or inability)

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[26] *Id.* § 300.5(b)(9).

[27] D. JORDAN, DYSLEXIA IN THE CLASSROOM 185-89 (1972) (used with permission).

to decode printed symbols into thought, or to encode thought into printed or written symbols.

Echolalia. Tendency to subvocalize (mutter, whisper, move lips) while reading or writing; tendency to transpose syllables when repeating word units (alunimum for aluminum).

Endophasia. Tendency for listener to move his lips in time with speaker's voice.

Hyperactivity. Habitual nervous, jittery behavior which can be controlled by child, but which is a distracting factor in learning situations; responds to tranquilizing drug therapy; similar to but not the same as hyperkinesis.

Hyperkinesis. Nervous, jittery, destructive, disruptive, abrasive behavior which child cannot control; responds to stimulant drug therapy, but not to tranquilizing drugs.

Hypokinesis. Sluggish, surly, self-centered, antisocial behavior; usually accompanied by obesity; infantile emotional reactions cause chronic social conflict.

Ideational Agnosis. Inability to visualize or recall constructions of words; inability to remember which letters are needed for correct spellings; difficulty in recalling correct order (sequence) of letters within words; handwriting may be clearly legible but content does not make sense.

Legasthenia. Inability to relate ideas (concepts) to symbols (percepts); a bridge is out between ideas (experience) and the symbols representing the ideas [see also *Visual Aphasia*].

Minimal Brain Damage. A loosely used term, sometimes a synonym for minimal brain dysfunction; generally considered too ambiguous and usually avoided by clinicians.

Minimal Brain Dysfunction. An umbrella term used for a variety of disabilities; a general term used when a child cannot read at all (alexia) or can partially read, write, or spell (dyslexia); occasionally used to designate aphasia or dysphasia.

Motor Agnosia. Inability to write legible letter or word forms; handwriting resembles a series of scratches, although the writer may have a clear mental image of how the letter forms should appear; the handwriting often makes sense to the writer, but is illegible to others.

Oral Aphasia. Inability to enunciate or say the words intended; sometimes referred to as motor oligophasia.

Perseveration. Tendency to run on and on while speaking, writing, or spelling; inability to turn loose of one pattern in order to being a new one (edgege for edge, banananana for banana, Kent Keng for Kent King).

Pleonasm. Tendency to add unnecessary words in oral or written language; tendency to add words to text while reading or copying.

Primary Reading Disability. Reading failure because of organic, emotional, or perceptual disability.

Secondary Reading Disability. Reading failure because of poor teaching, faulty attention, lack of application, faulty vision, poor health, and so on.

Semantic Aphasia. Pronouncing or repeating words correctly without comprehending their meaning; often seen when children can decode fluently but have no idea of what they have just read.

Specific Dyslexia. Often used to designate specific reading disabilities which have been identified or analyzed.

Strephosymbolia. A term coined by Orton to designate (twisted symbols); a synonym for visual dyslexia (reversals, rotations, transpositions).

Visual Dyslexia. Difficulty interpreting ("seeing") printed or written symbols accurately; tendency to perceive symbols upside down, backward, or in scrambled sequence; inability to comprehend items presented in series.

Visual Agnosia. Inability to perceive overall configurations; the reader sees only isolated symbols instead of clusters, syllables, whole word units, or whole number units.

Visual Aphasia. Inability to recognize printed words as representing the person's listening-speaking vocabulary; inability to comprehend the fact that print is talk written down; sometimes a synonym for legasthenia.

Specific learning disabilities are usually found in individuals who have adequate motor ability, average to high intellectual capacity, adequate hearing and vision, and adequate emotional adjustment, but who show a deficiency in learning and academic achievement.

One serious problem with this particular handicapping condition is the widespread social, cultural, and racial stereotyping tied to its diagnosis. Some commentators include in the category, by definition, only children from what they would term "culturally enriched" homes; upper-class and middle-class white children are more likely to be diagnosed as learning disabled than are minority children. Minority children with difficulties similar to those exhibited by white children are very likely to go undiagnosed or to be misclassified as "educable mentally retarded" rather than "learning disabled."[28] In some schools, classes for the learning disabled are all-white programs, many of them offering remedial instruction to white students who are having difficulty in school rather than offering, as the law intends, special education for those children handicapped by a genuine specific learning disability.

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[28] D. AUSUBEL, SCHOOL LEARNING 234-35 (1969).

It is important to note that, because of the difficulty in diagnosing specific learning disabilities, the Public Law No. 94-142 regulations contain special provisions regarding the participants in and procedures for evaluation of any student suspected of having the condition.[29]

2.5.2 EDUCATING STUDENTS WHO ARE SPECIFICALLY LEARNING DISABLED

A wide variety of remedial treatments are used to combat specific learning disabilities. Among the educational approaches are those which emphasize neurological development, perceptual-motor training, psycholinguistic training, visual training, diet, behavior modification, or some combination thereof. Treatment and educational programs recommended are usually highly correlated to the diagnostic background and training of the evaluator.

Underachievement is the most distinguishing characteristic of a specific learning disability. Therefore, some teaching methods used for remedying educable mental retardation and certain emotional disabilities can also correct various learning disabilities. However, treatment should always be keyed to the specific characteristics and, where known, the specific cause of a given disability.

Learning disabled students frequently experience reading difficulties. The nature and degree of a given student's impairment determines the type of reading program needed. Developmental reading instruction, for example, is for students lacking rudimentary reading skills. It is comparable to the regular curriculum for lower elementary grades and focuses upon the sequential development of reading skills. In contrast, corrective reading instruction helps students who have mastered the basic reading process but who need instruction to correct minor deficiencies normally eliminated in the course of learning to read. Remedial reading instruction is designed for students whose reading skills are not developed even after they have received developmental and corrective reading instruction. Remedial reading instruction is usually helpful and appropriate for learning disabled students.

Instruction for learning disabled students is most often provided in a program that affords a high degree of integration into the regular program, although a self-contained classroom is sometimes necessary. For the majority of learning disabled students, sufficient instruction can be provided by an itinerant diagnostic remedial teacher who assists the regular classroom teacher in a resource room in the school where the student is enrolled or in a learning disabled clinic where the student spends part of the school day.

2.6 VISUAL IMPAIRMENTS

> "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.[30]

2.6.1 SYMPTOMS OF VISUAL IMPAIRMENTS

The symptoms of visual impairment are not always obvious.[31] The student may:

- Rub eyes excessively;
- Shut or cover one eye, tilt head, or thrust head forward;
- Have difficulty doing work that requires close use of eyes (such as putting puzzle parts together, or matching identical shapes);
- Blink more than usual, or become irritable when doing close work;
- Hold objects close to eyes;
- Be unable to see distant things clearly;
- Squint eyelids together or frown;
- Have crossed eyes;
- Have red-rimmed, crusty, or swollen eyelids;
- Have inflammed or watery eyes;
- Have recurring styes (small inflamed swellings on the rim of the eyelid);
- Itch, burn, or feel scratchy around or in his/her eyes;
- Have dizziness, headaches, or nausea following close eye work;
- Have blurred or double vision;
- Be clumsy.

There are three categories of visually impaired students. First, those who are "blind" perceive nothing or only perceive differences between light and darkness. The educational goal for blind students is usually to learn to read Braille. Second, "partially-sighted" students see very poorly but are capable of reading some printed matter. Third, students of "limited sight" have vision which can be corrected, usually through perscriptive lenses. This last category of students does not ordinarily require special education programs or services.

Periodic visual screening of all preschool and elementary age students can identify previously undiagnosed visual impairments. Often, visually impaired children are unaware of the discrepancies between normal vision and their own. Visual screenings are usually conducted using a Snellen chart, which contains lines of letters of varying sizes. The examinee is asked to read the chart aloud while standing 20 feet away. If the examinee can distinguish at 20 feet what the normal eye can distinguish at 20 feet, the examinee is said to have perfect or 20/20 vision. If, however, the examinee can only see at 20 feet what the normal eye would see at 200 feet, the examinee is said to have 20/200 vision.

Determination of a student's field of vision is important in assessing the extent of visual impairment. If, due to muscular or other impairment, individual's angle of vision is less than or equal to 20 degrees, that person's field of vision is so small that the person is considered blind or partially sighted.

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[29] 34 C.F.R. §§ 300.540-.543. *See* § 3.3 *infra*.

[30] 34 C.F.R. § 300.5(b)(11).

[31] *See* M. REYNOLDS, TEACHING EXCEPTIONAL CHILDREN IN ALL AMERICA'S SCHOOLS 608 (1977).

Identification of a student's visual acuity is of course only the first step in assessing visual impairments. A medical examination conducted by an optometrist or opthamologist should follow in order to determine the causes of the impairment and to identify any related medical difficulties.

Most individuals who diagnose visual impairment rely heavily upon medical or legal definitions of visual acuity. These definitions of blindness have assumed significant importance under various state statutes and under the Federal Social Security Act.[32] The legal definition of blindness, however, is of little or no use in fashioning appropriate educational programs for handicapped students under the Federal statutes concerning education of the handicapped. Further, a student may be defined as legally blind without being totally blind. Many legally blind children can, for example, learn to read using visual aids.

Perhaps most important in determining the educational needs of a visually impaired student is the student's "functional visual efficiency." This term refers to the extent to which the student functions normally using the limited vision s(he) does possess. It is important to note, however, that there are no objective measures of functional visual efficiency; the determination is subjective.[33]

There are a number of causes of visual impairment. Many cases of visual impairment can be traced to the mother's contracting German measles (Rubella) during pregnancy. Visual impairments can also result as birth defects from unknown prenatal causes or genetic difficulties. Finally, children can incur visual impairments after birth through accident and illness. An understanding of the cause of a visual impairment is not as important as a definition of the child's handicapping condition. Understanding the cause of a visual impairment may afford clues to whether there are additional related handicapping conditions such as diabetes or brain injury.

2.6.2 EDUCATING STUDENTS WHO ARE VISUALLY IMPAIRED

Though in the past seriously visually impaired students were educated almost exclusively in residential institutions, the trend in recent years has been to place the students in regular schools. In many cases, however, residential placement is preferred due to the intensity of the program and the high degree of specialization required of the educational personnel.

Visually impaired students rely heavily upon their senses of touch and of hearing. Consequently, instruction designed to sharpen and refine these faculties is an important part of their education. Training in tactile perception (*e.g.*, exercises in the use of touch to determine shape) is frequently an element in programs for visually impaired students. Experiential learning, or learning by doing and by direct exposure to real world situations, is an effective method for instructing the visually impaired in academic areas and in social survival skills necessary for leading an independent life.

The importance of providing visually impaired students with concrete, practical experiences cannot be understated. That it is difficult for such students to comprehend spatial relationships and other visual concepts is obvious. A number of educational tactile models and audio aids, such as three dimensional geographic maps and "talking books," are available.

Visually impaired students can learn to read. For partially sighted students, reading materials printed in large type (usually one-eighth of an inch high) may suffice. For other partially sighted students and for the blind, instruction in Braille is appropriate.

Braille is a well-established touch reading system in which characters are represented by one to six raised dots arranged in cells two dots wide and three dots high. Braille is read from left to right with the fingers of one hand while the fingers of the other keep place. Proficient Braille readers read about two to three times slower than sighted readers. Because Braille is somewhat difficult to learn, intelligence, motivation, and patience influence a student's ability to master it. A number of contractions enable readers to achieve a regular reading pace but may result in Braille readers having difficulty spelling. In addition, students, particularly older ones who have learned Braille, must continually reinforce and sharpen their reading skills.

Once students have learned how to read Braille, they can learn to write Braille by using a special Braille typewriter or by hand using a special slate and punching stylus to emboss the appropriate dots on paper. Students who learn Braille also frequently learn to use standard typewriters in order to communicate with sighted readers. Visually impaired students who must rely upon Braille, however, should ordinarily be taught some fundamentals of handwriting. While handwriting is obviously difficult for visually impaired students, they should at least learn how to write their own signatures.

Students who are either blind or partially sighted may also rely upon special aids to learn arithmetic. A visually impaired student may learn arithmetic concepts, not just via Braille, but also via such means as an abacus, an arithmetic board, a talking calculator, modified calculators, tape measures, rulers, slide rules, and compasses. Similarly, the students may learn social studies and geography by using embossed maps.

A great many "talking books" are increasingly available. The Library of Congress distributes without charge a large number of these recordings to public libraries. The libraries in turn lend the talking books and special phonographs to visually impaired individuals. Most common textbooks are available as talking books from the American Printing House for the Blind. Many of these talking books employ compressed or rapid speech transmission, that is, playing the recorded speech at unusually rapid rates, thereby enabling students to cover materials much more quickly than they could otherwise. Research suggests that compressed or rapid speech talking books are no less effective educationally than regular talking books.

Several new aids for instructing the visually impaired have been and are being developed. For example, the Opticon is a computer which scans printed material and converts it onto tactile pins which produce a vibrating image of letters on the fingers of the blind person. Although the Opticon and similar aids are expensive, many schools are adopting them.

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[32] 42 U.S.C. § 423.

[33] *See* SURAN, SPECIAL CHILDREN: AN INTEGRATIVE APPROACH 147 (1979).

In addition to special aids, visually impaired students will also benefit from special accommodations and programs. One can accommodate visually impaired learners by lighting the classroom in such a way as to enable the students to use their residual visual acuity to its utmost. Special educators recommend that visually impaired learners work in classrooms without glare and where light is distributed directly and evenly.

Mobility training may be an important component in the education of visually impaired students. Parapetologists, professionals expert in mobility training, as well as other specially trained educators can teach visually impaired students how to use a cane, a seeing-eye dog and/or sighted guide. Students can thus acquire a means of self-sufficiency and mobility.

Any educational program for visually impaired students must serve not only their fundamental academic needs, but also their social and emotional needs, and their special needs for training in locomotion and mobility. Young or recently impaired students, for example, need training in the appropriate head and facial orientation during conversation and in the appropriate body orientation while walking. Some of these endeavors are quite difficult; students therefore need their families and their school's personnel to demonstrate sensitivity to their special emotional and motivational problems. This is particularly true for partially sighted students, who have a tendency to adjust less well than either blind or fully sighted persons. Much of the difficulty visually impaired students experience in adjusting socially and emotionally stems from the negative attitudes sighted people hold toward them.

2.7 EMOTIONAL DISTURBANCES

> "Seriously emotionally disturbed" is defined as follows:
> (i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:
> (A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;
> (B) An inability to build or maintain satisfactorily interpersonal relationships with peers and teachers;
> (C) Inappropriate types of behavior or feelings under normal circumstances;
> (D) A general pervasive mood of unhappiness or depression; or
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
> (ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.[34]

2.7.1 SYMPTOMS OF EMOTIONAL DISTURBANCES

The definition of conditions included under Public Law No. 94-142 as handicaps that are "seriously emotionally disturbed" is a very narrow one. It is limited to severe and long-term conditions which substantially limit a student's ability to function effectively. Specifically excluded from the definition are students who are socially maladjusted, a milder impairment which consists primarily of socially inappropriate behavior. Students who engage in socially maladjusted behavior, however, may be included in this category if they also exhibit serious emotional disturbances. In addition, in some cases, socially inappropriate behavior which persists over time and increases in intensity may become so serious as to warrant a diagnosis that the student suffers a serious emotional disturbance.

Serious emotional disturbances may be caused by physiological or psychological factors. Many students with emotional disturbances cannot be "cured" by medical, psychological, or educational treatment. All, however, can significantly improve over time with proper treatment.

There are many different types of problems which are included within the category "seriously emotionally disturbed." Labels described here include a wide variety of impairments, making the terms useful only in the most general way; specific descriptions of the symptoms exhibited by a student are more useful in determining an appropriate program for the student.

"Schizophrenia" is a term used to describe several types of disorders, all of which are characterized by persistent and extensive withdrawal from reality resulting in emotional and intellectual impact. "Childhood schizophrenia" is used to refer to schizophrenia which begins before adolescence.

Hyperactive students are those seriously emotionally disturbed students who are highly emotionally aggressive, cannot delay gratification, behave inappropriately (*e.g.*, throwing things or speaking out too frequently at the wrong times), play frenetically, and frequently need the intervention of a teacher or parent. Hyperactivity is usually accompanied by academic difficulty, due in part to the inability to delay gratification and the inability to resist even the most mundane distractions. There are many degrees of hyperactivity, a number of which are not severe enough to warrant classifying a student as seriously emotionally disturbed. As such students grow older, the symptoms of hyperactivity disappear for the most part, but vestiges (*e.g.*, occasional impulsiveness, inability to pay attention and excess energy) may persist.

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[34] 34 C.F.R. § 300.5(b)(8). The original regulatory definition included autism as an emotional disturbance. The term has now been removed and is defined as a health impairment. *See* 46 Fed. Reg. 3865 (1981).

Some commentators contend that learning disabilities are at the root of most behavior problems, including those associated with emotional disabilities. Research does indicate that there may be a large number of children who are adjudicated delinquent and who also suffer from learning disabilities, but there is insufficient proof of a cause and effect relationship between learning disabilities and emotional disturbance.

2.7.2 EDUCATION OF STUDENTS WHO ARE EMOTIONALLY DISTURBED

Services to emotionally disabled individuals should be carefully coordinated for constant monitoring so that intervention to interrupt the cycle of inappropriate behavior at school is always available. Educators assess the types of demands made of the student; the student's ability to meet those demands; the student's interaction with peers, teachers, and family; the intensity of the student's desire to change; and the student's self concept. A suitable program of consistent rules of behavior and appropriate responses from teachers and parents is then developed.

Educational programs for the emotionally disabled should satisfy students' need for easily identifiable successes reflecting improvement. To meet this need, many programs use "behavior modification" (or, as some educators term it, "B-mod"). The assumption behind behavior modification theories is that one can teach any individual to behave better by rewarding appropriate behavior and ignoring inappropriate behavior. Token rewards or frequent praise encourage positive responses. When positive behavioral patterns are established, the rewards become unnecessary. The approach is controversial and has variable rates of success.[35]

The behavior modification approach initially entails specific definition of the problems to be remedied and clear delineation of the responses to be made by educators, family, and peers to appropriate and inappropriate behavior. Implementation of the behavior modification approach requires careful observation of the student's behavior and painstaking adherence to numerous small, well planned steps toward the desired behavior. Recordkeeping is essential. A behavioral baseline is defined early and is used to measure progress. Progress is recorded regularly and frequently so that those working with the student can assess the program's usefulness. Many such progams use written or oral contracts with the student concerning goals and rewards for progress.

Many doctors and a number of school districts encourage the use of prescription drugs to control the behavior of emotionally disabled students. Ritalin and dexadrine are frequently prescribed to reduce hyperactivity. Doctors assert that these drugs increase attention span and promote good temperament in addition to reducing hyperactivity. A number of school districts have required certain students to take medication regularly as a condition of continued enrollment. Whether a family should accept such an arrangement warrants serious consideration. The school district may demand that the drugs be taken as a part of the student's individualized educational program. A family might successfully resist such a demand on the grounds that this coerced drug use constitutes a violation of the student's and family's right to privacy and constitutes cruel and unusual punishment. In addition, drug use forced by a school is *ultra vires*, or beyond the lawful scope of a school's powers.

The presence of a "crisis teacher," a professional specially trained to help students through particularly difficult periods on an individual basis, can facilitate the implementation of educational strategies for emotionally disturbed students. Community mental health clinics and facilities can advise and train regular and special class teachers, counsel families, and teach itinerant personnel to assist in schools. If the student needs constant medical and psychiatric care, however, admission to a psychiatric hospital may be the only available course of action. For the less seriously impaired, a learning environment structured to promote the therapy being applied, coupled with familial participation in the therapeutic process at home, should suffice.

2.8 HEALTH IMPAIRMENTS

> "Other health impairments" means (i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affect a child's educational performance.[36]

The range of health impairments that may affect educationally handicapped students is virtually infinite; the range of impairments which qualify students for special programs is not. To determine whether Public Law No. 94-142 covers a given health impaired student is to determine whether the student's affliction creates a *need* for special education programs and services.[37] Under Section 504 of the Rehabilitation Act, any health problem which substantially impairs a "major life activity," such as learning, or full participation in an educational program, qualifies a student for coverage, and educational services, under that statute and its implementing regulations.[38]

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[35] *See* R. Martin, Legal Challenges to Behavior Modification (1975).

[36] 34 C.F.R. § 300.5(b)(7). The original regulatory definition did not include autism as a health impairment. The term was added later, having been removed from the definition of emotional disturbances. *See* 46 Fed. Reg. 3865 (1981).

[37] 20 U.S.C. § 401(1) and 34 C.F.R § 300.5(a) require that a student is, first, handicapped and then in need of special education before (s)he falls within the protection of Pub. L. No. 94-142.

[38] 34 C.F.R. § 104.3(j).

One handicapping condition, autism, which many regard as an emotional disability, has now been specifically redefined under the regulations issued to implement Public Law No. 94-142. Under these regulations, autism is now specifically defined as a form of "other health impairment."[39]

Pregnant students are often considered "handicapped" or placed in special education classes. School officials have unsuccessfully argued that pregnancy is a form of handicap covered within the definition of "health impaired." However, unless the student suffers from a complicated pregnancy, special education is probably not appropriate. Separate programs and services for pregnant students are not ordinarily contemplated under the other major federal statute and regulations concerning the issue, Title IX of the Education Amendments of 1973.[40]

After a physician has diagnosed a health impairment, the question educators and parents face is whether the impairment constitutes a chronic illness so disabling as to limit the student's ability to lead a normal educational life. In answering that question, they should consider the extent to which the student requires hospitalization, the frequency with which medical care must be received and the difficulty of its administration, the nature and severity of the pain the student suffers, and the intensity of the emotional and other needs accompanying the health impairment.

The educational needs of health impaired students are as different as the cause of their impairments. Many health impaired students need no special education programs or services; others may, for example, require occasional tutorial instruction at home. The two most commonly offered services are physical alterations to make educational programs and facilities accessible and counseling to help students adapt to their impairments. The families of health impaired children, especially if the impairments are severe or terminal, may have significant needs which educators should consider.

Restrictions on a health impaired student's physical activity may limit his/her experience, thereby affecting his/her "intelligence" as it is measured on standardized intelligence tests. In determining the accuracy of the tests as predictors of the student's abilities, the special circumstances of the handicapped individual should be taken into account. Similarly, impairments of motor ability may affect a student's performance on tests requiring the exercise of motor capabilities to select or record answers, or to demonstrate in any other way the abilities being tested.

Students' advocates should determine whether a health impairment is chronic or temporary. A temporarily handicapping condition should probably not be used to invoke special education processes and protections, given the considerable stigma associated with the label "handicapped."

Some children may regularly require, during school hours, such services as the administration of injections or the insertion of a catheter. In the midst of considerable controversy, the United States Department of Education has tentatively indicated that the provision of clean intermittent catheterization services is to be considered a "related service" required under Public Law No. 94-142.[41]

2.9 ORTHOPEDIC OR PHYSICAL IMPAIRMENTS

> "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (*e.g.*, clubfoot, absence of some member, etc.), impairments caused by disease (*e.g.*, poliomyeletitis, bone tuberculosis, etc.), and impairments from other causes (*e.g.*, cerebral palsy, amputations, and fractures or burns which cause contractures).[42]

2.9.1 SYMPTOMS OF ORTHOPEDIC OR PHYSICAL IMPAIRMENTS

An orthopedic impairment is one which affects the bones, joints, tendons, and muscles and thereby tends to prevent movement. Orthopedically impaired children differ significantly from one another in terms of their handicapping conditions, intellects, and personalities. It is therefore difficult to speak of the characteristics and needs of the group as a whole. (Many orthopedically impaired children are also mentally retarded or suffer from speech, hearing, or visual defects, learning disabilities, or other health impairments; these children are classified as multihandicapped and will be discussed later.) One may, however, gain insight by considering certain categories of orthopedically handicapping conditions: neurological impairments; congenital malfunctions; musculoskeletal conditions (caused congenitally or by a later disease); and traumas or accidents.

Damage or deterioration of the central nervous system — neurological impairment — almost always causes muscular weakness or paralysis. The most common neurological impairment in children is cerebral palsy. The condition can result from brain injury before, during, or after birth. It affects children's voluntary motor functioning in varying degrees. The motor disorders are often accompanied by mental retardation; seizures; learning disabilities; and speech, hearing, and visual impairments. As a result, the cerebral palsied child may need services beyond those prescribed for the motor disorder.

One of the more common congenital malfunctions is spina bifida, which develops during the early fetal period when the spinal column of the fetus is being formed. Spina bifida is characterized by a failure of the bone surrounding the spinal cord to come together, leaving an opening. Part of the spinal cord then protrudes, and a small sac of spinal nerves and fluid may form on the child's back. The ensuing damage to the nerves does not affect the brain but does affect organs and muscles from the opening down. The child's legs and bladder are often affected so seriously as to cause motor and urinary problems.

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[39] *See* 46 Fed. Reg. 3865 (1981). However, the Reagan Administration has placed a "hold" on this technical amendment pending further review. 46 Fed. Reg. 19,000 (1981).

[40] 20 U.S.C. § 1681.

[41] *See* 46 Fed. Reg. 4912 (1981). However, the Reagan Administration has placed an indefinite suspension on this policy interpretation. *See* 46 Fed. Reg. 25,614 (1981).

[42] 34 C.F.R. § 300.5(b)(6).

Of the various orthopedic handicapping conditions, musculoskeletal conditions are the most common but also the least likely to interfere with intellectual development. Musculoskeletally impaired children usually do not suffer from multiple handicaps. An example of a musculoskeletal disability is muscular dystrophy, which is characterized by progressive weakness caused by the degeneration of muscle fibers. It progressively limits physical mobility. Somewhat similar is arthritis, a condition that affects the joints, causing swelling, stiffness, deformity, and immobility. Apart from the emotional problems that may ensue, these types of conditions do not usually affect the child's intellect or other capacities.

The last category of orthopedic impairments is comprised of those handicaps resulting from trauma or accidents. Car accidents, disease, fires, and the like can necessitate amputation or result in other disfigurements; these may create orthopedic impairments. An often overlooked cause of orthopedic impairment in this category is child abuse; many children become physically impaired in this way. These causes of orthopedic impairment can create serious emotional and behavior problems which must be considered in designing special education programs.

Although the causes and conditions of orthopedic impairments are numerous, one may generalize somewhat about the emotional problems frequently associated with these impairments. Many physically disabled children exhibit maladjusted behavior; they are often withdrawn, shy, and self-conscious. While these characteristics are aslo found among the nonhandicapped, they are more prevalent among the orthopedically impaired.

Generally, orthopedically impaired children have difficulty developing positive self-concepts. Due to their disabilities, they feel different from their peers. Accidents in class may cause embarrassment and increase the fear of social rejection. The children often become frustrated in their desire to participate in activities with other students.

Problems in evaluating intelligence and academic achievement levels for these children can arise. Standardized tests often fail to assess these children adequately, for questions based on the activities of nonhandicapped children are often meaningless to children who have never been able to participate in such activities. As a result, these children achieve lower-than-average test scores even though they may have average or higher intellectual potential.[43]

Some orthopedically impaired children adjust better than others. Their parents' attitude toward them is a major reason for the difference. Many parents are overprotective, making adjustment into an independent life style extremely difficult for their children; others reject their children and deny them needed support. A special education program should help parents develop constructive attitudes and understand their children's handicaps.

Children who become handicapped due to accident or illness often differ significantly from those who are born handicapped. A child who becomes handicapped later in life remembers his/her capabilities and knows what has been lost. This may cause greater frustration and more serious emotional complications than may exist for congenitally handicapped children.

In addition to assistance in dealing with their emotional needs, many health impaired students may need a program designed to include special health education. This component of the student's instructional program would include training in the skills needed to deal with the symptoms and side effects of the impairment. Thus, for example, a student in need of catheterization might be trained in the use of the catheter and proper sanitation related to use of the device, or a student on medication might be trained in proper techniques for administration of the medication.

2.9.2 EDUCATION OF STUDENTS WHO ARE ORTHOPEDICALLY IMPAIRED

Education of the orthopedically impaired has undergone a drastic change in the last few years. Before, physically handicapped students were sent to separate schools, not because educators considered them intellectually inferior, but because educators thought it best to protect them from rejection by their nonhandicapped peers. It was felt that each handicapped student would be better accepted if his/her classmates suffered similar handicaps. Today the goal is to integrate these students as completely as possible into regular academic classes. Many such children are intellectually average or above and need regular academic programs. The ideal classroom for them includes both handicapped *and* nonhandicapped students. Handicapped children can, in such a setting, come to understand that other handicapped children face similar problems and can simultaneously benefit from contact with nonhandicapped children.

One should understand that, in contrast to other handicapped students, physically handicapped children do not usually need special academic instruction; they need help with their physical, medical, and other health problems. That is, the orthopedically impaired do not usually require special teaching methods but require that regular academic programs be made physically accessible. Many medical specialists are involved in the education of the physically impaired, together assessing each child's specific needs. The personnel involved vary according to the child's health impairments but usually include a physician, a psychologist, a physical therapist, an occupational therapist, and a neurologist. These are important in assuring that the child's special education program is appropriate. Many physically crippling diseases cause progressive deterioration. An Individualized Education Program (IEP) should therefore take into account the rate at which a child may lose his/her motor abilities and performance skills. Unless the possibility of deterioration is taken into account, the IEP can soon become useless to the child.

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[43] The regulations require that evaluation procedures be free of bias and afford handicapped students a fair opportunity to demonstrate their true abilities. 34 C.F.R. § 300.532.

Finally, in assessing the needs of an orthopedically impaired child, it is extremely important to have parental input. An appropriate educational program cannot be organized without considering the experiences the child has had during his/her early years. If the parents have rejected the child, the teacher must be ready to accept the child fully in order to compensate for the home life. Furthermore, as is the case for all handicapped students, educators should always include parents in the development of the child's educational program so that they can share their insights and gain a deeper understanding of the child's needs and abilities.[44]

Orthopedically impaired students can be placed in a wider variety of settings than those in which students with other handicaps can be placed. The ideal is to integrate the handicapped into regular classes. Children with mild orthopedic impairments and normal intelligence are clearly eligible for such placement. Although these children may need an itinerant specialist, a resource room teacher, or an aide, they should not be placed in special schools merely because they experience difficulty in mobility.

For others, the severity of their handicaps or the presence of multiple handicaps may preclude full-time participation in regular classes. Some schools, citing architectural barriers, attempt to prevent physically handicapped children from attending regular academic classes. Of course, physical accessibility to programs and services is guaranteed under Section 504 of the Rehabilitation Act. The only situation in which a school can legally limit physical accessibility is when a reasonable alternative form of accommodation is offered.[45] Placement outside the appropriate educational setting will not ordinarily be permissible on the grounds that physical accommodations cannot, or cannot easily, be achieved. Moving a student to another site or program because of problems in accessibility is not an "accommodation" but is instead a change in placement requiring full IEP procedures.[46] For students who must be segregated to some extent, the location of the student's classroom within the public school should enable the handicapped child to participate with nonhandicapped children in nonacademic activities. An effort should be made to educate the orthopedically impaired child in the most normal setting possible and for as long as possible. If hospitalization is necessary, the child should continue to receive instruction in the hospital, along with additional support and encouragement to help alleviate the fears and anxieties over the hospital experience. In addition, hospitalized handicapped students should be integrated to the maximum extent possible with nonhandicapped students, whether hospitalized or not. This can occur, if no where else, in such programs as extracurricular activities or art classes.

Orthopedically impaired children often need adaptive equipment. A child may possess so little motor control, for example, that (s)he is unable to sit in a regular chair. For such a child, special positioning equipment such as a corner chair (a chair that keeps the child's shoulders forward so they remain flexed allowing better use of the hands) may be used. Other children may need equipment to facilitate their locomotion, communication, or grooming and hygiene. Necessary equipment may include pencil holders; adapted typewriters; page turners; weights for the wrists to eliminate uncontrolled movements; book holders; paper holders; and stand-up tables to prevent muscle contractions, provide proper circulation, and maintain desired postures. These devices, though relatively simple mechanisms, are often the key to assuring a child an education.[47]

Physically handicapped students of average intelligence may easily become underachievers due to the frustration they face in performing what would for nonhandicapped students be the simplest of tasks. Special education programs must therefore provide the children with additional support and encouragement. Physically handicapped children often become frustrated by their inability to reach goals they set for themselves. Efforts should be made to help the children set and achieve realistic and meaningful goals. The children's interests should be directed towards activities in which they can have a sense of accomplishment. While the children's education should teach them to become as self-sufficient as possible, setting unattainable goals only produces frustration.

In general, a physically handicapped child's special education program should not be purely academic because physical therapy and social and emotional adjustment are also very important. Teachers must be sensitive to the frustration and rejection the physically handicapped student faces and must help him/her cope with them. Schools must make architectural changes in order to remove the physical barriers preventing the orthopedically impaired from participating in nonhandicapped children's activities. A carefully designed education program can provide most physically handicapped students with the skills (s)he will need for an independent life.

2.10 MULTIPLE HANDICAPPING CONDITIONS

> "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.) the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.[48]
>
> "Deaf-blind" means concomitant hearing

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[44] Parents are to be included in IEP meetings under the terms of the federal regulations. 34 C.F.R. § 300.344.

[45] Policy Interpretation No. 3, Program Accessibility, 43 Fed. Reg 36.034 (1978).

[46] *See* § 4.2 *infra*.

[47] *See* § 4.4 *infra*.

[48] 34 C.F.R. § 300.5(b)(5).

> and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for the deaf or blind children.[49]

Medical practitioners have significantly reduced infant mortality rates. They have done so, in part, by increasing the survival rate of infants suffering from complicated and very severe handicapping conditions. This, in turn, has increased the number of handicapped children needing special education.

Handicapping conditions can appear in many combinations; the ensuing discussion will focus on the most common ones. Advocates and educators should make certain that there is strong evidence that separate handicapping conditions are present in a particular student. The reported incidence of retardation, for example, is fairly highly correlated with cerebral palsy. Many diagnoses of cerebrally palsied students as mentally retarded are unconvincing since the intelligence tests used in making those diagnoses require such high levels of motor coordination and oral communication that a cerebral palsied individual cannot demonstrate his/her true abilities. Many individuals suffer from both mental retardation and emotional disturbances, and often there is substantial overlap of the two conditions. Consequently, it is difficult to determine if the individual is multihandicapped (suffers two separate disabilities) or if one condition is causing the other; *e.g.*, mental retardation may cause excessive frustration leading to emotional disturbances. In each instance, clarifying the diagnosis is an essential step in determining what the appropriate educational program will be.

There are many individuals who are multihandicapped by both deafness and blindness. Deaf-blind students are very frequently placed in residential settings because of the very high level of specialization required of their instructors. Usually, these students are successfully educated through a one-on-one tutorial approach which emphasizes the student's sense of touch. There is nothing, however, inherent in this particular handicapping condition which would mandate this special approach and these students, like almost all other handicapped students, are presumably more successfully educated in a setting which more closely approximates the regular school setting.

The specific educational needs of multihandicapped persons depend on the handicaps present and on the individual needs of each student. For severely impaired multihandicapped individuals, however, the emphasis in an educational program is usually on social, self-help, and communicative skills. In addition, efforts should be made to enhance students' potential for economic self-sufficiency. It is usually advisable to have an occupational therapist provide training in manipulative skills. For severely handicapped students with communicative deficiencies, a "communication board" may be appropriate. The student communicates basic thoughts by pointing to words on a board.

2.11 DEVELOPMENTAL DISABILITIES

> A "developmental disability" is a severe, chronic disability of a person which:
>
> (a) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
>
> (b) Is manifested before the person attains age twenty-two;
>
> (c) Is likely to continue indefinitely;
>
> (d) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living; and (vii) economic sufficiency; and
>
> (e) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.[50]

The category of persons considered "developmentally disabled" is broad, covering many of those with the conditions described previously in this chapter. Three factors are relevant in determining whether a person exhibits a developmental disability and is therefore eligible for coverage under the Developmental Disabilities Act (D.D. Act).[51] First, the condition must be attributable to a mental or physical impairment, or both. Second, the condition must manifest itself before age 22. Finally, the condition must be so severe that it substantially limits funtioning in designated areas of major life activities, as defined by the statute as set forth above, and consequently necessitates long-term services.

An individual may be covered under Public Law No. 94-142 but not under the D.D. Act, or vice versa. A primary goal of the D.D. Act is to aid those whose needs cannot be met under Public Law No. 94-142 or Section 504.[52] The D.D. Act definition, because it is linked to rights and protections which are less broad than those under the other two statutes, should only be used if the student cannot be covered under the other definitions.

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[49] *Id.* § 300.5(b)(2).

[50] 45 C.F.R. § 1385.2 (Proposed Regulations, 45 Fed. Reg. 31,013).

[51] 45 U.S.C. §§ 6000-6081.

[52] *See* § 1.4 *supra*.

CHAPTER 3

EDUCATIONAL EVALUATIONS

3.1 INTRODUCTION[1]

The educational evaluation is the most crucial step in the process leading up to the placement of a handicapped student into an appropriate educational program. During the evaluation, almost all of the information used in determining an appropriate placement and designing an individualized education program (IEP) will be gathered.[2] This information will comprise most of the evidence in any due process hearings or judicial activities that may arise concerning provision of a free appropriate public education to a particular student or eligibility of the student for protection under federal law.

A full evaluation, including a determination of the nature and extent of the student's educational needs and capabilities, must be made prior to placement.[3] Periodic reevaluation is required at least every three years but sooner if requested by a parent or teacher.[4]

3.2 PROCEDURAL PROTECTIONS DURING THE EVALUATION PROCESS

Public Law No. 94-142 and its regulations require written notice to the parents whenever school officials propose to either initiate identification or evaluation processes or refuse to initiate identification or evaluation.[5] Section 504 also requires notice prior to evaluation.[6] "Identification" is the term used to refer to the informal processes by which teachers, counselors, or other school or nonschool personnel decide that a student may have special needs that should be evaluated. The more formal process of assessing the student's needs through tests, observations, interviews, and the like is referred to as "evaluation." According to the regulations, the family should be provided with written notices whenever the school employs specific individual procedures to determine whether or not a child is handicapped. The procedural protections concerning evaluation are not required when basic tests or procedures are being used with all children in a school, grade, or class.

The notice of evaluation must include:

- A full explanation of the procedural safeguards available to parents and children under Public Law No. 94-142;
- A description of why the evaluation is being proposed;
- A description of the legal and educational options available; and
- A description of other factors relevant to the school's proposal.[7]

The notice must be written in language understandable to the general public and must be provided to the parent in his/her native language or usual mode of communication.[8] For example, Spanish-speaking parents should receive notice in Spanish and deaf parents might require notice in sign language. When a parent's normal mode of communication is not a written language, such as with certain Indian tribes, and notice is transmitted orally, the educational agency must ensure that the notice is understood and that there is written evidence that the notice requirements have been met.[9]

Written parental consent must be obtained before an evaluation that preceeds initial placement into special education.[10] Reevaluations may be conducted without parental consent, although parents must always be notified prior to the initiation of any evaluation.[11] A parent concerned about a school's plan to evaluate a child should be able to at least temporarily halt the proposed evaluation or challenge the nature or content of the evaluation by informing the school that there is an objection to the evaluation proposal and that a complaint will be filed under local or state Public Law No. 94-142 hearings and appeals procedures.[12]

The school's proposed evaluation may consist of many elements and may be carried out by many different personnel. If the school feels that it has strong preliminary indications of the nature of the child's problem, the evaluation may be very narrowly focused. Most children should, however, be subjected to a fairly wide range of tests and procedures, particularly in their first evaluation or if major changes which could affect schooling have occurred. Most children will be given a battery of tests measuring intelligence and aptitude or ability by a certified school psychologist or psychometrist.[13] In addition, a child may be tested by one or more of the following:

- A special education or resource room teacher, consultant, or specialist to determine the child's learning styles and achievement levels;
- A speech teacher, pathologist, clinician, therapist, or correctionist to determine the nature of speech impairments;
- A hearing clinician, audiologist, or audiometrist to determine whether the child suffers any hearing impairments;

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[1] Substantial portions of this chapter were initially drafted by Dr. Blair Glennon, former research assistant at the Center for Law and Education, and Dr. Lannie LaGear, The Cove School, Chicago, Illinois.

[2] *See* Ch. 4 *infra* (description of the process for determining an appropriate placement).

[3] 34 C.F.R. § 300.531.

[4] 20 U.S.C. § 1412(5)(C); 34 C.F.R. §§ 300.531, .534.

[5] 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R. § 300.504(a).

[6] 34 C.F.R. § 104.36.

[7] *Id.* § 300.505(a).

[8] *Id.* § 300.505(b).

[9] *Id.* § 300.505(c).

[10] *Id.* § 300.504(b).

[11] 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R. § 300.504(b).

[12] *See* § 5.3 *infra*.

[13] *See* § 3.7.6 *infra* (examiner qualifications).

- A school nurse to determine whether the child has any health or vision problems;
- A school social worker to determine the nature of the child's family and developmental background;
- A physical therapist to ascertain the nature of the child's physical impairments.

The child may also be referred to a medical specialist for detailed analysis of any medical problems.

When deciding whether to challenge the school's proposed evaluation process, several questions arise.

- Is each member of the proposed evaluation team a licensed or certified professional qualified to conduct the evaluation?[14]
- Is the scope of the proposed evaluation wide enough to provide a complete assessment of the child's strengths and weaknesses, both academic and behavioral?[15]
- Is each member of the proposed evaluation team an unbiased professional who can provide neutral and impartial evaluation results?
- Are the evaluation instruments and procedures to be used culturally fair and are they the most valid and reliable techniques currently available?[16]

If the quality or content of the school's proposed evaluation is in doubt, or, following the completion of the evaluation, if the results are questionable, an independent educational evaluation may be requested.[17]

3.3 INDEPENDENT EVALUATIONS

Schools must inform parents of the parent's right to obtain an independent educational evaluation of a student at the time that notice of the proposed evaluation or the proposed placement is given.[18] Schools are not, however, required to indicate where an independent evaluation may be obtained unless the parents request that information.[19]

An independent evaluation must be provided at public expense if the parent successfully contends that the school's evaluation was "inappropriate," or if such an evaluation is ordered by a hearing officer.[20] However, if the school alleges that its evaluation is appropriate and refuses to provide an independent evaluation at the school's expense, the school may initiate a hearing on the matter under the hearings and appeals procedures described in Chapter 5.[21] Following those procedures, if it is determined that the school's evaluation was appropriate, the parent may still obtain an independent evaluation but must finance the evaluation privately or through some other public source.[22] Possible alternatives in such a situation would be either to secure a free evaluation from a public source other than the school or to seek private or public (*e.g.*, Medicaid) insurance coverage for the evaluation.

3.3.1 SELECTING THE EVALUATOR AND PAYING FOR THE EVALUATION

Selection of the individual or institution to conduct the independent evaluation should be done with some care since the evaluator may later become an expert witness at the hearing, administrative appeal, or judicial review stage. The evaluator should not have any ties to the educational system and must not be an employee of the agency responsible for the education of the child. The independent evaluator might be in private practice or can be obtained through a public hospital or mental health agency; a state college or university; a professional association, such as a state psychological association; or a parents/advocates group, such as an association for retarded citizens.

3.3.1.1 Medicaid

If a child is entitled to services via Medicaid, those services should be used as much as possible. To obtain Medicaid financing for special education evaluations, the advocate should:

- Notify the school that the child has Medicaid coverage and that an assessment is going to be scheduled at a specific facility;
- Request immediate notification if the choice of facility is not acceptable to the school system;
- Schedule an evaluation at one of the Medicaid vendors in the area and inform them that the school system has been notified of the request for evaluation;
- If the facility needs to contact the school for information, act as coordinator between the facility and the school principal to avoid problems; and
- Attempt as often as possible to have all pieces of the evaluation completed at a single site.

3.3.1.2 Supplemental Security Income

Supplemental Security Income (SSI) is a federal program that provides financial assistance to handicapped people and may provide resources for evaluations. The basic purpose of the program is to aid handicapped children and adults who do not have sufficient income and resources to maintain an adequate standard of living.

Supplemental Security Income is available on a monthly basis. A parent or guardian has the right to apply on behalf of the handicapped person to get a formal decision of eligibility. Further information is available from the local social security office.

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[14] Indeed, many states require the involvement of a school psychologist before a student can be placed in certain types of special education classrooms. *See, e.g.*, Illinois Special Education Regulations 9.17 (Feb. 1979) (psychologist's concurrence on a child's eligibility for a program required if the child is allegedly mentally impaired).

[15] *See* § 3.7.3 *infra* (discussion of intelligence testing).

[16] *See* §§ 3.7.2, 3.9 *infra*.

[17] 20 U.S.C. § 1415(b)(1)(A).

[18] 34 C.F.R. § 300.505(a)(1).

[19] *Id.* § 300.503(a)(2).

[20] *Id.* § 300.503(b), (d).

[21] *Id.* *See* § 5.3 *infra*.

[22] 34 C.F.R. § 300.503(b).

3.3.1.3 Private Insurance

Private insurance, such as Aetna or Blue Cross, may also provide for evaluation services to policy holders. This avenue should be explored. If the use of their insurance will not cause additional cost to the parents, insurance could be used to finance an evaluation.[23] A federal policy interpretation under Public Law No. 94-142 and Section 504 states that a family cannot be required to use private insurance coverage to provide for special education programs and services if the family would be forced to pay some part of the cost of such programs or services. Nothing, however, prohibits a family from using private insurance to finance an independent evaluation when the state or school will not pay for it.

3.3.2 USE OF INDEPENDENT EVALUATION INFORMATION

An independent evaluation obtained at private expense must be considered by educational officials in any decision-making about appropriate programming for the child.[24] The results of the privately-financed evaluation may also be used in any hearing on the matter.[25] The use of results of a publicly-financed independent educational evaluation paid for by an agency other than the school is not clear although the regulations do indicate that, insofar as location of the evaluation and qualifications of the examiner are concerned, the independent evaluation should be treated in the same manner as a school's own evaluation would be treated.[26]

3.4 SPECIAL PROVISIONS FOR EVALUATION OF STUDENTS WITH SPECIFIC LEARNING DISABILITIES

The evaluation of a student suspected of having a specific learning disability is particularly difficult. By special provision in Section 5(b) of Public Law No. 94-142, the federal government was instructed to write separate regulations establishing specific criteria for the evaluation of suspected specific learning disabilities. As a result, the regulations under Public Law No. 94-142 set forth "Additional Procedures for Evaluating Specific Learning Disabilities."[27] These provisions require, as additional members of a student evaluation team, the student's regular teacher and someone qualified to diagnose the particular student's needs. One member of the evaluation team, other than the student's regular teacher, must observe the student's behavior in the classroom or, if the student is not in school, "in an environment appropriate for a student of that age."[28]

The team that evaluates a student can determine that the child has a specific learning disability only if the team finds a significant discrepancy between achievement and intellectual ability in one or more of the following:

- Oral expression;
- Listening comprehension;
- Basic reading skills;
- Reading comprehension;
- Mathematical calculation; or
- Mathematical reasoning.

However, even if the team finds a discrepancy in ability and achievement in one or more of these areas, a determination that a specific learning disability exists still may not be made if the discrepancy is primarily the result of:

- A visual, hearing, or motor handicap;
- Mental retardation;
- Emotional disturbance; or
- Environmental or economic disadvantage.

If one of these factors is the primary source of the student's problem, then the student must either be classified under a different category or be found ineligible under Public Law No. 94-142.

If the evaluation team does determine that a student suffers from a specific learning disability, then the written report of the evaluation must include specific evidence for the determination, including a description of the student's behavior in the classroom or in an environment appropriate for a student of that age and a discussion of its relationship to educational functioning. The report must also supply any relevant medical information. It must indicate whether there are elements in the student's environment or ethnic, cultural, or economic background that affect the student's specific learning disability. Finally, the evaluation report must be signed by each member of the evaluation team. Those team members who disagree with the team report are required to submit a written statement explaining their disagreement. This is the only circumstance under the federal regulations where all evaluators must sign and where such statements are required.

3.5 GATHERING INFORMATION ABOUT A STUDENT

For any evaluator or for any advocate monitoring the evaluation process, an essential activity is the gathering and review of all information previously included in the school's records concerning the student. In addition, all new information gathered about a student during the evaluation should be entered into the student's record. This information is necessary so that a complete picture of a student is available to those making diagnosis, placement, and programming decisions. Public Law No. 94-142 requires the establishment of procedural safeguards in each educational agency that would provide "an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child. . . ."[29] When requesting records, advocates should also invoke the Family Educational Rights and Privacy Act (FERPA), the so-called "Buckley Amendment,"[30] which includes protections for all students, not just the handicapped. Under both of these closely related provisions, parents have a right of access to the personal records of their child.[31] The advocate should be aware, however, that only under Public Law No. 94-142 does the parent have access to general school files in addition to the individual school record of the student.[32]

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[23] *See* U.S. Dep't of Educ., Policy Interpretation Under Pub. L. No. 94-142 and Section 504: Use of Insurance Proceeds, 46 Fed. Reg. 86,390 (1980).

[24] 34 C.F.R. § 300.503(c).

[25] *Id.*

[26] 34 C.F.R. § 300.503(e).

[27] *Id.* §§ 300.540-.543.

[28] *Id.* § 300.542.

[29] 20 U.S.C. § 1415(b)(1)(A).

Under the Buckley Amendment, the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g and 34 C.F.R. Part 99), parents and students (over age 18) have a right to:

- Give written consent to the disclosure of student records to persons who do not have a "legitimate educational interest" in reviewing the records;
- Inspect and review all written records;
- Obtain a hearing on complaints concerning student records; and
- Obtain corrections or amendments to student records.

When initiating a request for access to a student's record in matters relating to special education, an advocate may wish to include a specific request for access to the following:

- Grade reports, which indicate the patterns of a child's academic progress. Some school districts also maintain, on report cards or in student folders, anecdotal comments from teachers concerning a child's academic work. Also, if the school district maintains separate marks for deportment or conduct, these should be obtained. It may often be beneficial to obtain from the school district explanations of how the grading system operates. Does a grade only indicate knowledge of subject matter or does it include factors such as deportment, effort, improvement? Are all teachers required to follow uniform grading practices?
- Medical or health records; social worker or counselor reports.
- Psychological reports, which are generated as part of the evaluation process. These reports summarize the results of any evaluations and recommendations from the school psychologist concerning appropriate programs and services. Ideally, these reports contain names of tests administered, testing conditions, and test and subtest scores, as well as information about the edition or date of revision of the test(s), and whether or not the test(s) had been for the local district or for the sociocultural group of which the student is a member. Access to the actual test items used with a particular child is often difficult since the published tests are all copyrighted and confidentiality or "security" of tests are usually demanded by the testing profession.[33]
- Test scores which indicate information about factors such as achievement, reading readiness or abilities, personal or career interests and often provide data comparing the student to others of the same age or grade level.
- Anecdotal records, which have been generated by teachers, administrators, or anyone else coming in contact with the student and can indicate how the student is perceived by adults and peers.

Once the student's record has been compiled, the advocate should review the record to ensure that it is complete and then write an educational history based on the record and verified by the parent and the student. This educational history should be useful as a device for organizing information and may also be used as an exhibit in a hearing.[34]

WHAT TO LOOK FOR IN STUDENT RECORDS

The student record should contain:

- All dates of school attendance;
- Number of days absent and tardy;
- List of all schools attended;
- List of all grades completed;
- Description of course of study in each grade (regular class, remedial class, class for the gifted or honor students, or special education);
- List of homeroom and class teachers for each grade;
- Grades in each course for each term;
- Indications of whether the student was duly promoted to next grade at close of each year;
- Health record;
- Record of school vision and hearing screenings;
- Results and reports from any special evaluations conducted (speech, hearing, psychology, social work, guidance counselor, special teacher, etc.);
- All standardized achievement test results;
- Copies of all due process notices provided the family and of all consent forms concerning special education signed by the family; and
- Log of persons having access to student's records

Use this list to determine whether all records have been obtained. It is often necessary to make several visits to the school to obtain a complete file. Some districts maintain records in several different locations, such as the school building, the district central office, and the headquarters for the special education staff.

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[30] *Id.* § 1232g.

[31] *See* § 3.5 *infra* (discussion of the content of these records).

[32] *See* § 3.6 *infra* (discussion of collecting information on a school system).

[33] *See* § 3.5.3 *infra* (discussion on access to copyrighted material).

[34] *See* App. 3A *infra* (format for arranging information in an educational history).

3.5.1 RIGHT OF ACCESS TO STUDENT RECORDS

Under Public Law No. 94-142, parents have the right to "inspect and review" any education records relating to the student if those records are collected, maintained, or used pursuant to Public Law No. 94-142.[35] Under the Buckley Amendment, the right to inspect and review extends to all "education records," that is, all records that are directly related to a student and are maintained by an educational agency or institution or by someone acting for the agency or institution.[36] The Buckley Amendment denies access to certain records, however. Excluded from the coverage of the Buckley Amendment are:

- Records of educational personnel when the records are kept for the sole use of the maker and are not disclosed to anyone except a substitute;[37]
- Records of law enforcement units of educational agencies or institutions if the records are used solely for law enforcement purposes;[38]
- Employment records;[39]
- Records of a physician, psychiatrist, or psychologist that are created, maintained, or used only in connection with the provision of treatment to the student;[40] and
- Records of an educational agency or institution that contain only information relating to a student after (s)he was no longer a student in the institution or agency (such as alumni records).[41]

Between the Buckley Amendment and the Public Law No. 94-142 provisions, access to most relevant records concerning education and evaluation of a student is possible. However, several areas in which access is difficult remain. In cases involving special education, it is often desirable to obtain access to medical or psychological records which, under the Buckley Amendment, are accessible only to an expert.[42] Nevertheless, it can be argued that these records are accessible under Public Law No. 94-142 due to its broader definition of accessible records.[43]

One particularly troublesome problem with student records concerns information that the family or the advocate suspects is in the possession of the school but that is not included in official records. It may seem that more information about a student is being used than appears in the record. For example, informal discussions about a particular student may have had a bearing on diagnostic or other decisions about a student. Or, the records may physically appear as if they have been "sanitized" since some sections have obviously been deleted.

Assuming that all reasonable efforts to locate records have been exhausted,[44] that the information sought has not appeared in any of the records, and that the school refuses to provide the information in record form, what options are available? The course to take may differ depending upon whether it appears that the missing information may be beneficial or harmful to the student. If the omitted information would be useful to have in the record, then the process to amend a record prescribed by the Buckley Amendment[45] may be used to compel the school to include the information in the record. If, however, the omitted information is harmful, the family or advocate has the option of either writing a statement of his/her own, which then must be placed in the record, or of requesting, perhaps through a special education or student records hearing, that school officials or employees cease informally disseminating the information.

3.5.2 RIGHT TO OBTAIN AMENDMENTS TO STUDENT RECORDS

The Buckley Amendment gives a parent or student[46] the right to a due process hearing to contest the school record and to seek an amendment of it if the parent or student believes that information in it is "inaccurate or misleading or violates the privacy or other rights of the student."[47] Neither the statute nor the regulations provide further guidance on the definition of the type of information that can lead to an amendment.

The legislative history is somewhat illuminating; the Senators who sponsored the law, Senators James Buckley and Claiborne Pell, inserted a statement in the *Congressional Record* indicating that the purpose of the provision in the statute establishing the right to amend student records was not intended to afford an opportunity to contest such things as whether or not a student was entitled to receive an "A" or "B" in a particular course, but could be used to determine whether or not a grade was accurately recorded in a student's record. Senators Buckley and Pell also indicated that the amendment provision was designed for such situations as when a family wished to challenge the classification of a student as mentally retarded.[48]

Given the statutory and regulatory provisions, along with the legislative history just mentioned, there is sufficient legal support for amending a student's record in several situations. Erroneous, prejudicial, harmful, or irrelevant remarks frequently made in school evaluation reports[49] could be challenged on the basis that they constitute an infringement of privacy, contribute to stigmatization, or cause educators to provide inappropriate services or treatment for the student. It should also be possible to challenge the exclusion of certain information from the school record on the grounds that failure to provide the information is misleading.[50] For example, a parent may learn at a conference with the student's teacher that the teacher has compiled a series of charts portraying the student's classroom behavior and interactions with classmates. This information would normally be excluded from the student record because it represents the teacher's personal working notes.[51] However, in a case where the student is being considered for placement in a class for the behaviorally disabled, the information is extremely relevant, and it would be misleading to omit it.

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[35] 34 C.F.R. § 300.562.

[36] *Id.* § 99.

[37] 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3.

[38] *Id.*

[39] *Id.*

[40] *Id.* These records can, however, be reviewed by a physician or other appropriate professional of the student's choice.

[41] *Id.*

[42] It may be possible to argue, however, that these limitations on accessibility under Buckley apply only to records concerning "treatment" and not to records concerning "diagnosis." It is the latter area that would most frequently provoke the need for access.

[43] 34 C.F.R. § 300.562.

[44] *See* § 3.5 *supra*; App. 3B *infra*.

[45] 34 C.F.R. §§ 99.20, .21. *See also* 34 C.F.R. § 300.569(b).

[46] In dealing with the terms of the Buckley Amendment, a "student" is always defined as a student over age eighteen or a student who is attending a post-secondary institution. 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.4.

[47] 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.20.

[48] *See* McClung, *Student Records: The Family Educational Rights and Privacy Act of 1974*, 22 INEQUALITY IN EDUCATION 18 (1977).

[49] *See* § 3.8 *infra* (criteria for evaluation reports).

Once a request to amend a student record is made to the school, the school must decide whether or not to comply with the request and amend the record "within a reasonable period of time."[52] If the school decides to deny the request for an amendment, it must inform the parent of both its refusal and the parent's right to obtain a hearing on the matter.[53]

A hearing under the Buckley Amendment to challenge the content of a student record differs from a hearing under Public Law No. 94-142. A Buckley Amendment hearing can result only in a decision to amend or not to amend a student record.[54] For example, a hearing could determine whether a student's record should identify the student as mentally retarded. On the other hand, a Public Law No. 42-142 hearing officer could order a wide range of changes both in the record and for the student, including a change in placement.

In addition, the two types of hearings afford different due process protections. The Buckley Amendment requires, at a minimum, the following due process protections:[55]

- The hearing must be held within a "reasonable" period of time after the request for the hearing;
- The parent or student must be given notice of the date, time and place for the hearing reasonably in advance;
- The parent or student must be given a full and fair opportunity to present evidence relevant to the request for amendment;
- The parent or student is entitled to be assisted or represented by individuals, including attorneys, of his/her choice at his/her expense;
- The decision from the hearing must be made in writing and within a reasonable time after the conclusion of the hearing;
- The decision must be based solely on the evidence presented at the hearing; and
- The decision must include a summary of the evidence and a description of the reasons for the decision.

Unlike Public Law No. 94-142,[56] the Buckley Amendment does not ensure the right to an independent hearing officer. A Buckley Amendment hearing may be "conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing."[57] In fact, the regulations imply that the hearing will be conducted by a school official by referring to the hearing decision as the decision of the educational agency or institution.[58]

Amending a student record through a Public Law No. 94-142 hearing is also a possibility. Under Public Law No. 94-142, a due process hearing is available for "complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate education to such child."[59]

The authority of a hearing officer under Public Law No. 94-142 seems broad, in light of the scope of ultimate judicial review, where the relief may be such as is deemed "appropriate."[60] Consequently, amendment of an educational record should be well within the scope of a Public Law No. 94-142 hearing officer's authority.

While there is under Public Law No. 94-142 an explicit right to federal or state court review of a hearing decision under the Buckley Amendment, there is no direct grant of state or federal court jurisdiction over controversies involving the Buckley Amendment and its protections if matters cannot be resolved at the local level. There is, however, a right under the Buckley Amendment to present complaints about compliance with the provisions of this law to a Review Board of the United States Department of Education.[61] The ultimate relief that can be afforded under this process, however, is the termination of federal financial assistance to the educational agency or institution Such relief is of little benefit to the individual parent or student and could, in fact, be directly harmful since most schools rely on federal assistance to finance appropriate special education services.

3.5.3 COPYRIGHTED TEST MATERIALS OR TEST PROTOCOLS

When there is a dispute concerning the diagnosis of a student, the advocate will probably find it necessary to obtain detailed information about the school's evaluation of the student. Often, this information will not be a part of the student's records. A written report of the results of an evaluation is supposed to be available and can be obtained through the student records procedures described above; however, the background materials used to reach the results summarized in the evaluation report may also be needed. This is particularly true when an outside evaluator or expert witness is working for the student to make a detailed critique of the school's evaluation.

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[50] *See* § 3.8 *infra*.

[51] *See* § 3.5 *infra* (materials excluded under the Buckley Amendment).

[52] 34 C.F.R. § 99.20(b).

[53] *Id.* § 99.20(c).

[54] *Id.* § 99.21(a)-(d).

[55] *Id.* § 99.22. See Chapter 5 for a discussion of the hearing mechanism under P.L. 94-142.

[56] *Id.*

[57] 34 C.F.R. § 99.22(b).

[58] *Id.* § 99.22(d).

[59] 20 U.S.C. § 1415(b)(1)(E).

[60] *See* Ch. 5 *infra* (discussion of the Pub. L. No. 94-142 hearing process).

[61] 20 U.S.C. § 1232g(f), (g); 34 C.F.R. §§ 99.60-.67.

The evaluation report is usually based upon school records, to which the parents have legal access,[62] and information gathered during the evaluation itself, which is usually recorded in the private notes of the evaluator,[63] or in some cases on "test protocols." Test protocols are printed forms, available from the test publisher, on which the test is taken and where the evaluator records, scores, and/or analyzes the student's answers. Test publishers usually copyright the protocols and, for that reason, schools often refuse to give students copies. In addition, most school psychologists and other evaluators feel an ethical obligation to refuse to show test protocols to lay people because untrained personnel can easily misinterpret the information on the protocols.[64]

However, in most instances, the need for the test protocol arises from fairly complicated technical disputes over diagnosis or treatment of a student. It would not be particularly helpful to obtain a copy of the student's test protocol without an independent evaluator or other expert who can review the material and who has a copy of the test.[65] Since this expertise is essential to make the photocopy useful, it should be fairly simple to overcome "ethical" objections to the photocopying, *i.e.*, that the photocopy is being made for the benefit of the student's trained expert.

Federal copyright law[66] prohibits reproducing copyrighted material unless permission from the copyright owner (in this case, the test publisher) has been obtained. However, a "fair use" exception to the copyright law permits copying such material without consent when it is being obtained for "fair use":

> [T]he fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work and as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[67]

The copying of copyrighted test protocols, which contain specific information about a student, should constitute a "fair use" exception to the copyright law since it would be for educational purposes. No commercial gain would be sought or would accrue from the copying, so the potential value or market for the protocol is not diminished. The public interest in the education of handicapped children will not interfere with the pecuniary interests of a copyright holder.

Special problems arise when access to or copies of tests are needed. Many times, schools will argue that laypeople may not even examine tests used to evaluate students; photocopying the tests is usually out of the question. In addition, access to tests is restricted to maintain the security of the test. Development of new test questions or items is an expensive process; test publishers therefore seek to protect the tests so that they can be reused without any students gaining an advantage by practicing the test or memorizing correct responses. Test security usually must be respected. However, advocates should note that most of items on the WISC and the WISC-R, two commonly used intelligence tests, have been reprinted in full in Federal Supplement in the *PASE v. Hannan* case, >506 F. Supp. 831 (N.D. Ill. 1980).

Respect for test security does not mean that tests are never subject to scrutiny by laypeople. Parents and advocates should always be permitted, at a minimum, to review tests by going to the evaluator to examine a copy. On occasion, the evaluator or test publisher may demand assurances that test items will be kept confidential. This should present no difficulty unless the test becomes an important piece of evidence in an administrative or judicial proceeding. In this case, either the parties can reach an agreement or an order can be entered placing the test under protection. Under the protective order or agreement, the test can be released by the examiner to the family or advocate with the conditions that the test be examined only by people involved in the case and only for the purpose of preparing and presenting the case. To protect all involved, there should also be an agreement to keep the test under lock to prevent a breach of security.

3.6 COLLECTING INFORMATION ABOUT A SCHOOL SYSTEM

In addition to information about the individual student, certain information about the school system may have some bearing on the evaluation and placement process. While access to general information about a school system is not guaranteed under the Buckley Amendment, access may be possible under Public Law No. 94-142's grant of access to information from all "relevant records."[68] The following information may be relevant:

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[62] *See* § 3.5.1 *supra*.

[63] *See* § 3.5.3 *supra*.

[64] *See* American Psychological Ass'n, "Ethical Standards of Psychologists," *reprinted in* A. Anastasi, PSYCHOLOGICAL TESTING 628-90 (4th ed. 1976). These, the relevant professional standards of ethics, require such security.

[65] *See* § 3.5.3.1 *infra* (discussion of access to copyrighted tests).

[66] 17 U.S.C. § 101.

[67] *Id.* § 107. The legislative history indicates that "since the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible and each case raising the question must be decided on its own facts. [1976] U.S. CODE CONG. & AD. NEWS 5679.

- What curriculum and materials are used in each of the program alternatives proposed for the child? Care should be taken to examine not only the school's stated instructional objectives, but also whether or not the school is meeting those objectives. Course content and goals should be examined to determine which program is appropriate for the child's needs.
- Do the personnel who will work with the child in the proposed program have adequate background and certificates or licenses to provide the services needed?
- Are the facilities adequate to accommodate the child, *i.e.*, are they accessible and appropriate?[69]
- What types of students are in the various class or program placements recommended for the child?
- What financial resources are available to the school for programs and services?

3.7 EDUCATIONAL EVALUATION TECHNIQUES

Before any testing of the student, at least one initial interview with the parent(s) by someone on the evaluation team is recommended. This interview should be conducted in the native language or mode of communication of the parent(s) and should cover various aspects of the student's difficulties. For instance, the onset of problems, the cause (if known), and previous evaluations and/or treatment should be explored. There should also be a discussion of the student's behavior, including health, speech, intelligence, relationship with family members or peers, attitudes toward self, and expression of feelings. The student's capacity to function successfully in relationships with family and peers and in "real life" situations (known as "adaptive behavior") is a critical and necessary area for assessment.[70] Also, but *only* if it is educationally relevant, the discussion may include issues concerning the family situation: the cohesiveness of the family, its coping style and particular areas of stress, the atmosphere in the home, how the child's problems affect family life and relationships, and the number and age of siblings and their school grades. The interviewer may seek information about illnesses of other family members, including whether they were psychiatric, physical, or chronic, and their present status. Again, it is important that this information be sought *only* if it is relevant to the student's in-school problems. This initial interview should indicate whether an extensive psychological study is needed or whether a simpler or different manner of handling the student is called for, such as a modification in the way the school treats the student or a change in the relationship between the home and the school.

A thorough parental interview will usually include a follow-up session for compiling a "developmental history," including an account of significant experiences during the student's infancy and childhood. A full developmental history would describe:

- Characteristics of the pregnancy, such as the mother's health during the pregnancy and the length of the pregnancy;
- Characteristics of the birth, such as the type of birth, the length of labor, any complications, and the weight of the baby;
- Characteristics of feeding and weaning;
- Characteristics of the child's sleep patterns, such as nightmares or restlessness;
- Characteristics of the child's toilet training;
- Development of speech and any speech problems, such as stuttering or a sing-song quality;
- Motor development, *i.e.*, development of abilities to coordinate large and small muscles, including age when the child first sat up without support, age when the child first crawled, and the child's general activity level;
- Sexual development, including any traumatic sexual experiences and attitude of the child toward sex;
- School history, such as when the child first attended school, the child's relationships with teachers, and any problems that the child has with reading or mathematics;
- Health history, including any illnesses, injuries, prolonged high temperatures, or hospitalizations;
- Child's play patterns, such as his/her talents, interests, and relationships with peers; and
- Any significant family events that have affected the child.

If the student is retarded or suspected of being so, the Vineland Social Maturity Scale[71] may be used in the follow-up interview. The Vineland, used for people age 3 months to adulthood, evaluates behavior in the following categories; self-help in general; self-help in eating and in dressing; self-direction; and occupational, communication, locomotion, and social skills. The examiner may interview either the student or any person who knows the student well, such as a parent or guardian. The person interviewed provides factual descriptions of the child's customary behavior. The test manual gives standards of average performance for each age level for both sexes from birth to age 30, based on research with a very small sample of 10 "normal" people. The examiner must have had experience with the Vineland Scale for the administration to be considered reliable. Significant criticism of the Vineland has been made about the adequacy of the sample on which its norms,[72] or standards of average performance were developed and, in particular, whether the sample adequately represented minority groups. Advocates should be extremely cautious about its use, therefore.

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[68] 20 U.S.C. § 1415(b)(1)(A). *See* § 3.5.1 *supra*. In some instances, the records from which the relevant information may be obtained may not be easily accessible due to such factors as state privacy act restrictions on access to personnel files. Regulations under 34 C.F.R. § 300a.562 address only student records. Nevertheless, information of the type listed here is usually obtainable.

[69] *See* § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[70] In an evaluation of a student thought to be "mentally retarded," the Pub. L. No. 94-142 regulations *require* an assessment of adaptive behavior. 34 C.F.R. § 300.5(b)(4).

[71] *See* App. 3E (description and comments on the Vineland Social Maturity Scale).

[72] *See* § 3.7.2.1 *supra* (discussion of "norms").

Several other scales are also available to assess social development, for example, the AAMD Adaptive Behavior Scale and the Public School Version of this scale, as well as the Cain-Levine Social Competency Scale. These scales should be used only after careful review of their appropriateness for the particular student.[73]

3.7.1 THE TEST BATTERY

The psychological test battery, a composite of tests, measures the child's current level of general intellectual functioning and his/her specific cognitive or intellectual strengths and weaknesses (*e.g.*, analytical abilities, short-term memory, vocabulary). When specific or general weaknesses are noted or suspected, the tests can be compared with each other and with other data to confirm the diagnosis or to provide further insights. Tests may also give clues as to the causes of the disability. For instance, the Bender Visual-Motor Gestalt Test can help determine if perceptual-motor dysfunctions and/or minimal or gross brain dysfunctions are causing the child's intellectual deficits or behavioral difficulties. Sometimes the Bender is also used to assess emotional disturbance, although many professionals question this practice.[74] The usual battery may also include personality tests, which measure emotional factors in intellectual dysfunctioning as well as other emotional problems[75] that may be relevant to proper placement for the child.[76]

Before or after the psychological test battery is administered, it may be apparent that the student has hearing, speech, or visual difficulties related to the problem that led to the referral for evaluation. In such cases, referral to an evaluation specialist in one of these areas is appropriate. It is important to note that the regulations under Public Law No. 94-142 require that "the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skill (except where those skills are the factors that tests purport to measure).[77] In some cases it is unnecessary to administer a complete battery of cognitive and personality tests. However, it is important to note that "no single procedure may be used as the sole criterion for determining an appropriate educational program for a child."[78] For instance, it may be clear that a child's difficulties are limited to the emotional area. The evaluation would probably then be limited to tests to determine the student's specific emotional needs, although a determination of the student's needs and proper educational placement should not be based exclusively on one test or assessment.

Ordinarily the following individually-administered tests are included in a complete psychological evaluation:

- Stanford-Binet Intelligence Scale for Children, Form L-M,[79] or the Wechsler Intelligence Scale for Children, Revised (WISC-R);[80]
- Goodenough-Harris Draw-a-Person Test (DAP);[81]
- Bender Visual-Motor Gestalt Test;[82]
- Thematic Apperception Test (TAT) or Children's Apperception Test (CAT);[83] and
- A school achievement test such as ITBS, PIA, or WRAT.[84]

3.7.2 TEST DEVELOPMENT

In order to fully understand the use of tests in the evaluation of students,[85] it is important to have a general understanding of the means by which tests are developed and evaluated. Sometimes a test may not be appropriate for use with a particular student or in a particular context. Information of the type discussed here will be useful in determining whether a particular test is appropriate and in interpreting test results.

There are published professional standards, referred to as the "*APA Standards*," setting forth procedures to be used by those developing a test, information to be provided about a test, and use of test information.[86] The *Standards* are not incorporated into Section 504, Public Law No. 94-142, or their implementing regulations. The *Standards* are a part of federal regulations or guidelines concerning employment testing[87] and have been used by federal courts in employment testing litigation to determine the legality of testing practices.[88] The *Standards* have also been referred to in one recent case challenging racial bias in educational tests used to diagnose mental retardation.[89] For an advocate, the *Standards* may serve as a useful guide for scrutinizing test use. In doing so, however, it is important to remember that the *Standards* do not have the force of law and are insufficient in such areas as cultural or racial bias in tests.

There are some terms concerning testing that are important for understanding and interpreting test information. The most significant of these terms are described below.

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[73] *See* App. 3E (description and comments on frequently used tests).

[74] *See* §§ 3.7.3.8, 3.7.4.1 *infra*, and App. 3E.

[75] Note that there are serious difficulties with indiscriminate use of both the Bender and other projective tests. *See* § 3.7.4 *infra*; App. 3E *infra*.

[76] *See* Ch. 2 *supra* (discussion of the characteristics of the various handicapping conditions).

[77] 34 C.F.R. § 300.532(c).

[78] *Id.* § 300.532(d).

[79] *See* §§ 3.7.3.1, 3.7.3.5 *infra*; App. 3E *infra*.

[80] *See* §§ 3.7.3.2, 3.7.3.5 *infra*; App. 3E *infra*.

[81] *See* § 3.7.3.6 *infra*; App. 3E *infra*.

[82] *See* § 3.7.3.8 *infra*; App. 3E *infra*.

[84] *See* § 3.7.5 *infra*; App. 3E *infra*.

[85] *See* App. 3D *infra* (definitions of key testing terms).

[86] AMERICAN PSYCHOLOGICAL ASS'N, AMERICAN EDUCATIONAL RESEARCH ASS'N & NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS (1974).

[87] Equal Employment Opportunity Comm'n, Dep't of Labor & Dep't of Justice, *Uniform Guidelines on Employee Selection Procedures*, 33 Fed. Reg. 12,333 (1978) (formerly codified at 29 C.F.R. Part 1607).

[88] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[89] Larry P. v. Riles, 495 F. Supp 926, 970 (N.D. Cal. 1979).

3.7.2.1 Norms

A score on a standardized test used for evaluation is usually not meaningful without reference to "norms."[90] Most tests used for evaluation are "norm-referenced tests," that is, tests whose scores are used to compare the performance of the individual taking the test to the performance of an entire group of individuals who have also taken the test. Norms indicate how the sample group of individuals on whom the test was "standardized"[91] performed on the test. This sample group should be representative of the population of people to whom the test will ultimately be given; that is, essential characteristics of that population must be represented proportionately in the norm group. For instance, if the test is to be given in a country where 30% of the citizens live in cities, the standardization sample should be approximately 30% urban.

As another example, if the test is to be given to citizens of a country where 10% of the population is black, the standardization sample should be approximately 10% black.[92] It is also important that the norms be developed on a sample large enough that if a second comparable sample was tested, the distribution of scores would not differ appreciably from that of the standardization sample.

Many tests periodically update their norms or standardization sample because the characteristics of the population to be tested change over time. The advocate should encourage evaluators to use the most recent test and norms available and insist that the standards and norms used are provided. If the norms are selected properly and consequently do not represent such characteristics of the student as sex, race, socioeconomic status, ethnicity, or language background, the test should not be used. In the case of achievement tests, norms specially developed with students from the local school district can ensure an accurate measure of a student's strengths and weaknesses compared to other students who have gone through the same school curriculum.

3.7.2.2 Reliability

An important characteristic affecting the usefulness of a test is its "reliability,"[93] *i.e.*, the consistency of the results obtained on it. The structure of the test should be such that the same individuals will receive virtually the same scores on different versions of the same test ("comparability of forms" or "alternate-form reliability"). The test should not reflect specific contents but a relatively homogeneous universe of the achievements or abilities that the test purports to measure ("internal consistency" or "split-half reliability"); this is obtained by checking the variation between scores on comparable halves of the same test. It is also important that an individual who takes the same test again after a short time receive a similar score on both test administrations ("test-retest reliability" or "comparisons over time"), unless the test is specifically designed to measure short-term changes. Likewise, the score obtained when different examiners give the same test to the same people should be similar ("inter-rater reliability" or "scorer reliability"), and when the same test is given in slightly different situations to the same individuals, such minor differences should not affect the resulting score. All of the above contribute to a determination of the overall reliability of a test.

When measuring reliability, statistical techniques involve "correlating" one set of scores with another set, such as comparing scores on one half of a test with the scores on the other half of the same test, as is done in determinations of split-half reliability. Correlating involves determining the degree of correspondence in the amounts the scores on the two halves of the test change within a single test. For instance, increases in scores on one half of the test may or may not be accompanied by increases in scores on the other half. The degree of the relation between two sets of scores is expressed in a number called a "correlation coefficient." The values of correlation coefficients may range from +1.0 to −1.0, with a positive value indicating that two sets of scores increase together and a negative one indicating that the score in one set increases while the score in the other decreases. A zero coefficient value indicates that there is no consistent variation between the two sets of scores. A +1.0 or −1.0 means a perfect relation exists between the two sets of scores, in which case the scores of one set are predictable if the scores of the other are known. Tests with high correlation coefficients in the positive range are the most desirable for use.

3.7.2.3 Standard Error of Measurement

Reliability coefficients are helpful in determining whether it is appropriate to use a particular test. Another statistic is, however, more useful for understanding the meaning of a test score. Test users may use reliability coefficients in comparing tests, but they use "standard error of measurement"[94] in interpreting test scores. Standard error of measurement is a means of estimating the difference between the scores obtained on a test and the "true scores"[95] of the test-takers. The standard error of measurement has great stability across populations since it is relatively independent of range of talent and may be used to define upper and lower limits for an individual's "true score." In it, chance errors inherent in a test which occur when the test is administered are calculated by the average range of scores an individual might make over a large number of test administrations. The standard error of measurement is important in situations where scores are being compared on two or more administrations of a test or where single-point cut-off scores are employed, which is often the case for entrance into special education classes.

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[90] *See* App. 3D *infra* (key terms in testing).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

3.7.2.4 Validity

The validity of a test is another crucial characteristic. "Validity" is how well the test measures what it purports to measure. Validity is assessed by a variety of techniques, such as determining how well an aptitude test score correlates with the actual ability supposedly predicted by the aptitude test ("criterion-related validity"); whether items on an intelligence test become easier as the children tested become older; how adequately the test content samples the behavior skills or ability purportedly measured by the test ("content validity"); or whether the test measures skills and knowledge to which the student has been exposed through curriculum and instruction ("curricular validity" and "instructional validity").

3.7.3 INTELLIGENCE TESTS

The evaluation process must include some individual testing of the child. All children with academic difficulties should be given an individual intelligence test. The two most widely used intelligence tests are the Wechsler Intelligence Scale for Children (WISC, or WISC-R, the revised version of the WISC) and the Stanford-Binet.[96] Both tests rely heavily upon verbal skills. The Stanford-Binet samples general comprehension, visual-motor ability, arithmetic reasoning, memory, vocabulary, judgment, and reasoning and relies heavily upon abstract-thinking and problem-solving. Test scores on the Stanford-Binet are based on "mental age," or how well the test-taker compares with other individuals of the same age. A student who achieves a score of 100 on the Stanford-Binet is a student who is performing in a manner typical for someone of his or her age. The WISC, which attempts to measure many more factors descriptive of a child, samples a child's performance on twelve distinct subtests: information, similarities, arithmetic, vocabulary, comprehension, digit span, picture completion, picture arrangement, block design, object assembly, coding, and mazes. The WISC provides a verbal score, a performance score, and a full-scale score. Unlike Binet scores, scores on the WISC do not include consideration of age as a factor in performance. Both the Stanford-Binet and WISC require a trained examiner to administer the tests and interpret the scores.

Intelligence test information should be used very carefully. "Intelligence" is the most widely used — and misused — psychological term. Too many people consider "intelligence" and "IQ" to be synonymous. Test developers define "intelligence" when they determine which abilities to measure and which items to include on a test used to arrive at an IQ score. Different intelligence tests rely upon slightly different definitions of intelligence. As a result, an IQ score is only partially descriptive of an individual; an IQ score is only an expression of a particular ability level, weighted for the age of the individual tested, as that ability level is defined by the test.

Intelligence tests are a measure of abilities, particularly abilities that correlate highly with achievement in a school context. The tests do not tap a wide range of abilities or characteristics of the test-taker. As a measure of scholastic aptitude, IQ scores not only predict future academic success but reflect prior academic achievement. Most of these tests rely heavily on the measurement of verbal abilities, which are used heavily in school learning.

IQ scores reflect only a measure of ability at a given point in time; the scores are not immutable, nor is the "intelligence" they attempt to describe. While, generally, IQ scores remain relatively stable over time and consistently correlate at moderate to high levels with measures of achievement, sharp increases and declines in IQ scores do occur. Individual IQ scores may increase or decrease due to emotional or environmental influences. Student performance can be influenced by drastic changes in family circumstances or other stressful situations.

The tests reflect the middle-class norms of the typical school environment. As a result, students from low income homes are further disadvantaged by the test.[97] Also, because test scores are determined by contrasting an individual's performance with that of others of the same age, a student who has not been provided adequate educational opportunities in the past will be disadvantaged by the test. Conversely, a student subjected to a successful remedial educational program may show a gain in IQ. A low-income student often exhibits substantial decline in IQ scores the greater the time that student spends in school, particularly if the student has been enrolled in a special education curriculum for the mentally retarded or has been placed in a low-ability group for academic programming.

3.7.3.1 Stanford-Binet

This test, sometimes referred to as the "Binet," takes about thirty minutes for young children and up to an hour and a half for older ones. It can be used to test two- to eighteen-year-olds. Testing is begun with items that are easy for the child in order to establish a level at which the child can pass all items; testing continues through progressively more difficult items until a level is reached at which the child can pass no items. Test items are arranged in order of the age level at which the average child can pass them.

Unlike the WISC-R to be discussed below, the Stanford-Binet does not result in separate measures for different mental faculties or types of intellectual abilities (*e.g.*, verbal ability, perceptual speed); rather, the Binet produces a single score for intelligence based upon responses to a large number of items covering a wide variety of intellectual abilities.

The norms for the Stanford-Binet were established in the 1930s based on 3,184 native-born, white individuals including 100 children at half-year intervals from ages 1½ to 5½, 200 children at each year from age 6 to 14, and 100 children at each age from 15 to 18. An equal number of females and males were in each age group. Testing was done in 170 communities in 11 different states, with efforts to sample from urban, suburban, and rural communities. The sample, however, was slightly above the average for the general population of the United States in socioeconomic level and included a disproportionately high number of urban children.

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[96] *See* App. 3E *infra* (descriptions of all educational tests).

[97] D. AUSUBEL & F. ROBINSON, SCHOOL LEARNING 218 (1969).

No new norms have been developed for the 1960 revision currently in use. However, some changes in the Binet have been made since the standardization in the 1930s. Test questions have been changed to make them more contemporary, and certain items have been moved within the test to reflect changes in their level of difficulty.

The Stanford-Binet has proved very reliable both over short periods of time and in content. Most of the reliability coefficients or "correlation coefficients" are near .90 for it.

The standard error of measurement for the Binet is three points, which means that for any student taking the Binet, his/her true score on the test is within three points above or below the actual obtained score on the Binet. The standard error of measurement is important in situations where scores are being compared on two or more administrations of a test or where single-point cut-off scores are employed, which is often the case for entrance into special education classes.

The content of the Stanford-Binet test covers a wide variety of functions of "intelligence," *e.g.*, vocabulary, interpreting proverbs, memory, and practical judgment. Most criterion-related validity data has been gained by relating Stanford-Binet scores to academic achievement, *e.g.*, school grades, teacher's ratings, or achievement test scores, with most of the correlations ranging from .40 to .75. Also, items were chosen for this test mainly according to whether or not they became easier with increasing age.[98]

3.7.3.2 The Wechsler Intelligence Scale for Children-Revised (WISC-R)

The WISC-R requires about 50 to 70 minutes to administer, with less time required for young children. It is composed of 10 mandatory and 2 optional subtests, which are divided and grouped into a "Verbal Scale" and a "Performance Scale." The Verbal and Performance Scales together make up the "Full Scale." The WISC-R does not give mental ages (as does the Binet) but provides IQ scores for the Verbal and Performance Scales as well as the Full Scale. Raw scores on each of the subtests are converted to "scaled scores," so that the mean or average performance on each subtest is 10 and the standard deviation is 3. For the Performance Scale and the Verbal Scale, as well as the Full Scale, the mean score is 100 and the standard deviation is 15.

The standardization of the WISC-R, done in the 1970s, was a significant improvement over that of earlier intelligence scales. A sample of 2,200 children was chosen so that selected variables, or characteristics, of the children would parallel the demographic characteristics measured by the 1970 United States Census. These variables were age, sex, race (white and nonwhite), geographic region, occupation of the head of the household, and urban-rural residence. In the race categories, "nonwhite" included blacks, American Indians, and Orientals. The black percentage of the nonwhite sample was 92.4%; in the United States population, 91.3% of nonwhites are black. Puerto Ricans and Chicanos were categorized as white or nonwhite depending on their visible physical characteristics. The standardization sample did not include children with severe emotional problems or institutionalized persons who were mentally retarded, though non-institutionalized children suspected to be mentally retarded were included. Bilingual children were not included in the sample unless they could both speak and understand English. The WISC-R incorporated changes from the earlier 1949 WISC. The content of obsolete items was changed, the sequence of the tests was altered, certain ambiguities were removed, and instructions were adjusted.

The reliability of the WISC-R, both in terms of content and over time, is high for the Verbal, Performance, and Full Scales. Validity data include correlations with Binet scores that are in the .60s and .70s for the Verbal, Performance, and Full Scale scores.

The WISC-R is broken into subtests on the theory that capacities in different intellectual functions can be compared. Whether a difference in scores on subtests is significant enough to warrant attention depends on the standard errors of measurement of the subtests involved; a table that accompanies the WISC-R should be examined for this determination. Some examiners rely on the "scatter" of subtest scores for diagnostic clues. However, it is questionable whether this practice is justified. To decide if differences between the scores on the Verbal and Performance Scales are wide enough to warrant concern, a table in the WISC-R manual should be examined. A difference between Verbal and Performance Scales is not statistically significant unless it is at least 12 points.

In the context of the limitations explained above, the following description of the Verbal and Performance Scales and of the 12 subtests should be useful for understanding the scores on the WISC-R. The Verbal Scale includes subtests that predominantly involve using language; for instance, a subtest may require the child to explain a picture in his/her own words. The Performance Scale, on the other hand, involves less oral expression and relies more on observation and manipulation of objects with the hands.

The subtests of the Verbal Scale are Information, Similarities, Arithmetic, Vocabulary, Comprehension, and Digit Span.

- Information: The child responds to questions about general matters that (s)he is likely to learn in school; this subtest assesses the child's general store of information.
- Similarities: The child's ability to form abstract concepts and to see relationships between facts and ideas to which (s)he has been exposed is measured.

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[98] Freides, *Stanford Binet Intelligence Scale, Third Revision*, in 1 THE SEVENTH MENTAL MEASUREMENT YEARBOOK 772-73 (O. Buros ed. 1972).

- Arithmetic: The child manipulates number concepts and does computations.
- Vocabulary: The child is asked to define words.
- Comprehension: The child answers questions designed to reveal his/her understanding of how to respond to various situations (usually social) that are part of everyday experience.
- Digit Span (optional): The child repeats a series of digits spoken by the examiner as an indicator of short-term retention.

The subtests of the Performance Scale are Picture Completion, Picture Arrangement, Block Design, Object Assembly, Coding, and Mazes.

- Picture Completion: The child looks at a set of pictures with a missing part and must tell the examiner what is missing.
- Picture Arrangement: The child puts together a series of pictures depicting an event so that they tell a story; this test requires visual attention to detail, some understanding of social situations, and synthesis of parts into wholes.
- Block Design: The child assembles blocks painted different colors to reproduce a design shown to the child; this test measures perceptual abilities and the ability to see parts in wholes and to synthesize parts.
- Object Assembly: The child assembles a series of puzzles using common objects.
- Coding: The child matches visually perceived symbols.
- Mazes (optional): The child draws an unbroken line to show how to escape a maze.

As with the Stanford-Binet, it is important that the examiner be highly trained to both administer and score the WISC-R, particularly since subjective judgments may be necessary in some cases in scoring the Similarities, Information, Vocabulary, and Comprehension subtests. The examiner must be sufficiently familiar with the test so that (s)he can adequately respond to and encourage the child during testing. Sometimes the examiner must alter the test slightly to obtain an accurate score for the student. For example, some examiners allege that they can ease the effect of cultural bias in a test by rephrasing certain questions so that a minority student can more easily understand them. However, slight variations from standard administration can affect the child's score in both directions and must be approached very cautiously, since there is usually no proof of the validity or reliability of the variation.

The WISC-R was designed for children age 6 through 16 years. For younger children, of ages 4 to 6-1/2 years, the Wechsler Preschool and Primary Scale of Intelligence (WPPSI) is appropriate. In addition, the Weschsler Adult Intelligence Scale (WAIS) is available for individuals age 16 and over.

3.7.3.3 Wechsler Preschool and Primary Scale of Intelligence (WPPSI)

The WPPSI includes 11 subtests also grouped into a Verbal Scale and Performance Scale; 10 of these are used to calculate an IQ score. Eight of the subtests are easier versions of WISC subtests. The Verbal Scale subtests are Information, Comprehension, Arithmetic, Similarities, Vocabulary, and Sentences. The new test, Sentences, is a memory test. The Performance Scale subtests are Picture completion, Block Design, Mazes, Geometric Design, and Animal House. Geometric Design involves copying designs, and Animal House is similar to the WISC Coding subtest.

The reliability of the WPPSI is considered good enough for individual evaluations preceeding placement, and the standardization is considered good by most evaluators. A sample stratified for geographic region, urban versus rural residence, and occupation of the father, using the 1960 Census, was employed. The sample was also designed to include a fair representation of both white and nonwhite test-takers. Validity data as of 1972 were less than completely satisfactory. Furthermore, the WWPSI has been criticized for being too lengthy for young children.

3.7.3.4 The Wechsler Adult Intelligence Scale (WAIS)

The WAIS is also made up of 11 subtests grouped into a Verbal and a Performance Scale. The Verbal Scale subtests are Information, Comprehension, Arithmetic, Similarities, Digit Span, and Vocabulary. The Performance Scale subtests are Digit Symbol, Picture Completion, Block Design, Picture Arrangement, and Object Assembly. The WAIS is generally considered a good measure of adult intelligence. Evidence of its reliability and validity is good. However, the WAIS may need revision due to outdated content and norms.

3.7.3.5 A Comparison of the WISC-R and the Binet

It is important to know when the WISC-R is more appropriate than the Stanford-Binet and, conversely, when the Stanford-Binet is preferable to the WISC-R. The Binet is more useful for testing children younger than 48 months old (the lowest age covered by the Wechsler Preschool and Primary Scale of Intelligence) and above the age of 30 months (the ceiling age of the Bayley Scales of Infant Development). Some argue that the Binet is useful for testing severely retarded children due to its low floor, but others question[99] the value of determining a child's exact score when (s)he is functioning far below average. The Binet is heavily loaded with verbal items; thus those with language handicaps, limited English-speaking ability, or nonverbal talents will not demonstrate their full potential on this test.

Advantages of the WISC-R include its breakdown into a Verbal and a Performance Scale. In addition, the arrangement of the test items makes the WISC-R less likely than the Binet to lead to frustration and fatigue since it does not include the increasingly difficult items the Binet relies on to establish the upper limits of the child's abilities. Furthermore, the WISC-R seems to entail a greater variety of tasks than the Binet, which emphasizes abstract verbalization. This variety of tasks may be advantageous both for an analysis of the different aspects of the child's intellectual functioning and for making the test interesting. Both tests have been criticized as being biased against and unfair to low-income and minority test-takers.[100]

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[99] *Id.*

3.7.3.6 Goodenough-Harris Draw a Person Test (DAP)

This quickly and easily administered test is often given at the beginning of a test battery to put a young child at ease rather than to assess the child. Typically, the child is asked to draw the best (most accurate) pictures (s)he can of a man, then of a woman, and, finally, of himself or herself.

The main purpose of the DAP, when it is used as an assessment tool, is to obtain a quick measure of intellectual ability. The theory behind the test is that the child's drawing of a familiar object measures the maturity of his/her concepts in general, that is, the ability to perceive, to abstract, and then to generalize. Drawings of the man and woman are scored according to very specific criteria. Credit is earned by the details included in the drawing, not by artistic skill.

The test is appropriate only as a very rough measure of intellectual functioning in children ages 4 to 14, since the validity of the DAP as a measure of intelligence is not at all well-established. Reliability between different scorers is usually high (correlation coefficients being in the .80s and usually .90s), and retest reliabilities are in the .60s and higher. However, validity coefficients (relating DAP scores to the WISC-R and Binet, for instance), though positive, range from very low to high into the .70s and .80s. Artistic talent probably does not generally inflate the DAP score, although it may. Girls also usually score slightly higher than boys.

Standardization of the DAP was done on 2,975 children representing the 1950 United States Census's family occupational distribution and four geographic areas of the United States. Although some claim that DAP is "culture fair," there are clearly cultural influences on the drawing, including clothing drawn, implements being used, and the nature of action portrayed, all of which may influence the child's score.

Although the DAP is sometimes used to evaluate personality, this use is even less appropriate than the DAP's use as a measure of intellectual ability. Extensive research has failed to show consistent relations between characteristics of the drawings and personality factors. The most to be expected of the child's drawings for personality analysis is that they might give further evidence of already suspected emotional problems. The self-drawing is included to provide some data on the child's self-concept. Again, validity for this use of the child's drawings is not established. Much additional evidence would be needed for valid conclusions about the child's self-concept.

3.7.3.7 The System Of Multicultural Pluralistic Assessment (SOMPA)

The SOMPA taps a broad range of information about a student to provide a description of "estimated learning potential." It is widely touted as a "culture-fair" assessment tool,[101] although this reputation is probably not warranted. The evaluation technique, now designed only for children aged 5 to 11, involves 2 sets of scales, one based on parent interview information and the other on student assessment information. The parent interview information includes: data on sociocultural background (family size and structure, socioeconomic status, and urban acculturation); information on the child's adaptive behavior (family roles, community roles, peer relations, nonacademic school roles, earner/consumer roles, and self-maintenance roles); and a health history inventory. The student assessment information in the SOMPA includes: physical dexterity tasks, the Bender Visual-Motor Gestalt Test,[102] the child's weight as compared to height, assessments of visual and auditory acuity, and the results of the WISC-R.[103] The SOMPA results are compared to the appropriate sets of age group norms for black, English-speaking Caucasian, or Spanish-surnamed students.[104]

The SOMPA is built upon the theory that, since all intelligence tests measure learned behavior and past academic achievement, the best estimate of learning potential compares a child's performance with that of other children of similar ethnic and sociocultural background who have had the same opportunities to learn. A difficulty with the SOMPA is precisely this presumption that similar ethnic and sociocultural backgrounds correlate with the opportunity to learn. A more obvious problem is the system's reliance on the WISC-R, which many critics charge is culturally biased. There is insufficient evidence that the norms stratification used by the SOMPA can offset the bias suspected in the WISC-R. An additional difficulty with the SOMPA is the investment of time and resources required to administer the entire test, particularly the extensive parent interview, which is mandatory and is factored into the test score. Many schools would be unable, or unwilling, to engage in such a process.

3.7.3.8 Bender Visual-Motor Gestalt Test

In this test, the child copies nine different geometric designs one at a time as they are placed in front of him/her. This test takes about ten minutes to administer.

Koppitz,[105] one of the authors of the test, has suggested a variety of uses for it: diagnosis of neurological injury, diagnosis of emotional disturbance, prediction of school achievement, and measurement of intelligence. Usually, the only role given to the Bender in a psychological test battery is to provide evidence regarding brain injury in children of age five to ten. However, an examiner will sometimes consider "emotional indicators" in the drawings to determine the presence and nature of some personality disturbance.

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[100] *See* § 3.9 *infra* (discussion of bias in testing).

[101] *Id.*

[102] *See* § 3.7.3.8 *infra*.

[103] *See* § 3.7.3.2 *infra*.

[104] One problem with SOMPA is that the norm group was composed exclusively of California children, with the Hispanic group almost solely limited to Chicanos. Other ethnic groups are not included in the norms, and it is unclear whether there is sufficient representation of different family occupational or educational levels or sufficient urban/rural diversity.

[105] E. KOPPITZ, THE BENDER GESTALT TEST FOR YOUNG CHILDREN (1964).

The original Bender-Gestalt geometric design cards have been adapted several times with the original test materials left intact but new administrative, scoring, or interpretive procedures employed.[106]

Research demonstrates that certain characteristics of the drawings can be evidence of brain injury in children. The presence of these characteristics is measured by the "developmental scoring system." This score is not sufficient evidence for a diagnosis of brain injury, which would require further psychological and medical investigation.[107]

3.7.4 PERSONALITY TESTS

In addition to tests aimed mainly at an assessment of intellectual functioning, many psychological test batteries will include evaluations of the characteristics of the student's personality. For instance, such tests may indicate how well the student can cope with stress or how anxious the student is.

3.7.4.1 Projective Tests

Most of the personality tests used in the evaluation of students are projective tests. Projective techniques involve the presentation of a relatively unstructured task to the student, to which the student can respond in an infinite number of ways. For example, the student may be given an ambiguous stimulus, such as a picture or an incomplete sentence, and only general guidelines as to how to respond: "Tell a story about the picture" or "Complete the sentence." The ambiguity in the test is intended to provide the student with an opportunity to "project" or show indications of his/her personality through the responses elicited by the test.

Projective tests have been the subject of widespread criticism. The reliability and validity of the tests is not strong. Most are poorly standardized and have insufficient norms. These techniques have, however, been very popular, in large part because they are fun for most examinees. Some examiners use projective tests at the start of an evaluation session to relax the examinee and to develop a rapport with the testtaker. When attempts are made to draw significant conclusions about a student on the basis of projective test information, great care should be taken. Following is a discussion of two commonly used projective tests.

3.7.4.1.1 Rorschach Inkblot Test

The materials for this test are ten inkblot designs printed on cards. The cards are presented one at a time to the child in a standard order, and the child is instructed to tell the examiner what (s)he sees or what the designs remind him/her of.

Scoring involves recording certain characteristics of the child's response. For instance, how accurate is the match between the actual design on the card and the child's perception? What is the content of the perception? How does the child use color? There is no single scoring system used by all examiners.

Interpretation of the scores of children is more difficult than interpretation of adult scores. This is because children have not yet developed stable personality structures and because the appropriateness of particular responses varies with age. Furthermore, some deviation from standard administration is appropriate and probably necessary with very young children in order to obtain any useful information, although the Rorschach test is not recommended for children of preschool age.

Norms on the various aspects of the responses are available for children and adolescents, and it is necessary that the examiner use the norms appropriate for the age and background of the child tested. When normative data is used, it is important to check the characteristics of the normative population.

Like all projective tests, the Rorschach should never be administered or scored by an examiner who is not thoroughly trained in its use. Few school psychologists have sufficient training to administer or score the Rorschach test since the test requires an expertise ordinarily possessed only by a clinical psychologist or psychiatrist.

The Rorschach is frequently criticized for the inadequacy of its validity data. More research is needed to show that the Rorschach does facilitate correct diagnosis and that personality descriptions from Rorschach analysis correspond with those gained through clinical interviews and behavioral observation.

There are indications that Rorschach, as well as other personality measures, is influenced by factors such as cultural setting, social class, socioeconomic status, parents' occupation, and whether the child's residence is urban or rural.

3.7.4.1.2 Thematic Apperception Test (TAT) and Children's Apperception Test (CAT)

The TAT consists of 19 pictures on cards and one blank card, within 4 sets of 20 cards each. Of the 4 sets, one is considered appropriate for boys, one for girls, one for males over age 14, and one for females over age 14. The number and content of the cards used may be varied to suit the purpose of the particular test, but an adequate test will usually include at least 10 cards. The pictures on the cards have been chosen to represent basic conflict situations in our culture. The child is presented with each card, one at a time, and asked to tell a story to go with the picture. The examiner records the stories verbatim.

Presumably, viewing the pictures will trigger stories that reveal the child's underlying needs, mood, attitudes, self-concept, or difficulties which (s)he is unable to attribute consciously to himself/herself. The stories can provide data about the child's characteristic style of coping (for instance, his/her "defense mechanisms"), and the examiner can predict whether this style can succeed in preserving equilibrium. Further, the stories can give information about the ability for oral expression and about the general level of intellectual functioning. Sometimes, however, the stories are quite superficial and reveal little about the personality of a child except that (s)he is uncooperative or inhibited.

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[106] *See* App. 3E *infra* (descriptions of the many versions of the Bender test).

[107] Kitay, *Bender-Gestalt Test*, in 1 TH. SEVENTH MENTAL MEASUREMENT YEARBOOK 394-95 (O. Buros ed. 1972).

Different examiners may use TAT material for different purposes; there is no uniform or accepted scoring technique, nor an explicit set of rules for accurate interpretation of fantasy material. The immense problems resulting from lack of standards for scoring and interpretation are compounded by lack of normative data regarding responses of examinees with various backgrounds. Consequently, any predictions about anxiety, adjustment, or other personality characteristics that an examiner makes solely on the basis of TAT responses are tenuous. Furthermore, many commentators criticize the cultural and sexual biases in the administration and interpretation of this test.

The Children's Apperception Test (CAT) was designed for children age 3-11 and is very similar to the TAT. Although the TAT may be used even with children of nursery school age, the particular content of the CAT pictures may result in longer and more elaborate stories from young children. The CAT contains ten pictures of animals involved in the main conflict situations of childhood (*e.g.*, eating, toilet training). Animal figures rather than human figures are used since it is assumed that young children can identify more easily with animals than with people. Data from the CAT should be viewed with the same reservations noted above in regard to the TAT.

3.7.4.2 Minnesota Multiphasic Personality Inventory (MMPI)

For students age 16 or over, a personality assessment might be conducted through administration of the MMPI, a lengthy personality inventory in which the examinee is asked to review 550 statements about himself and to indicate whether each is "true," "false," or "can't say." The items on the test concern issues relating to health; sexual, religious, political, and social attitudes; education; occupation; family; and behavior. An individual's score, which is sometimes generated by computer, is compared to one of several sets of standards that have been developed for use with the MMPI. Considerable expertise is required for proper interpretation of the MMPI.[108]

3.7.5 ACHIEVEMENT TESTS

In addition to measures of aptitude or ability and personality, a full educational evaluation should include either the administration of new achievement tests or an analysis of existing achievement test results. Achievement tests are used to assess the effects of past instruction or training on a student. These tests typically assess educational skills in such areas as reading, language, arithmetic, or study skills; they are often used to measure the success of a remedial education program with a student.

Achievement test scores can be reported in a manner that allows comparison of a student to a particular norm group, or to measure the student's own progress from grade-to-grade, or both. When normative information is provided, it may compare a student to national, regional, state, or local school district standards.

Achievement test scores are often used to compare an individual's actual achievement (as measured by an achievement test) with the level of attainment that would be expected on the basis of tests of that student's aptitude or ability. It is also useful to compare a student's level of achievement from year to year to discern whether there is a pattern of increase or decline in achievement and, if so, if this may be related to other factors about the student.

In assessing any achievement test information, it may be useful to ask the evaluator the extent to which the test measures skills and knowledge that the student has had a fair opportunity to learn. If a test does not "match" the curriculum and instruction to which the student has been exposed, the achievement test will not present a fair picture of what the student has accomplished. For most elementary school students who have been through a standard school curriculum, the issue of curricular or instructional match will not be a significant problem since most elementary achievement tests are patterned after curriculum offered in most schools. For students who have been placed in special classes or for some minority students, sufficient educational opportunities may not have been offered and the advocate would do well to question the evaluator about the extent to which the test is a fair measure of what was taught.

Some of the commonly used achievement tests are the Iowa Tests of Basic Skills (ITBS), the Iowa Tests of Educational Development (ITED), the California Achievement Tests (CAT), and the Stanford Achievement Tests (SAT). These and other achievement tests are described in Appendix 3E.

3.7.6 EXAMINER QUALIFICATIONS

Mention has frequently been made here of how important it is that the examiner have adequate experience and training. While a trained "psychometrist" may administer tests, the interpretation of individual intelligence tests ordinarily should not be done by an examiner without at least a master's degree level training in educational or clinical psychology and supervised experience in the administration, scoring, and interpretation of tests.[109] Projective tests ordinarily should not be administered by an examiner unless (s)he has had appropriate supervised training, generally at a clinical doctoral level.[110]

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[108] *See* App. 3E *infra* (additional information on the MMPI).

[109] H. GROSSMAN, MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION (1973).

The examiner must know the particular test very well before his/her administration or interpretation can be considered acceptable. The examiner must also be familiar enough with the test that (s)he does not deviate from the standard administration. At the same time, the examiner must be able to establish rapport with the student, set the student at ease, and motivate the student.

The term "standard administration" refers to the set procedures described by the testmaker for giving a test. These procedures should be uniformly used by examiners whenever the test is administered. If a test is given under appreciably different conditions, meaningful or fair comparisons between scores on a given test are not possible.

For example, Sattler[111] notes that merely asking children to think about their answers before giving them on certain subtests of the WISC can significantly increase their scores. Similarly, merely changing a phrase in an instruction can affect a child's score. Many tests, especially the Wechsler intelligence scales, have time limits which must be strictly followed. The Wechsler scales require that the examiner stop administering a subtest and go on to another subtest after the child has failed a specific number of items; if the examiner does not stop a subtest at the appropriate item, the child is unfairly subjected to a longer test and perhaps more failure experiences which may adversely affect his/her performance on subsequent subtests. It is also important for the examiner to be well-trained in scoring the test, especially for items where there is no single, clear-cut, correct answer and judgment by the scorer is needed, or for items where a response is not clear enough to score and the examiner must follow up on it during testing. Finally, testing of very young children requires special expertise; young children are often difficult to motivate in an examination situation and easily distracted from the task at hand.

3.8 THE EVALUATION REPORT

After all data on the child are collected and analyzed, a report should be prepared by the examiner and submitted to the school or, in the case of an independent evaluation, to the person or organization that requested the evaluation. In most schools, the evaluation report submitted by the school's evaluator or evaluation team will not automatically be forwarded to the family or the advocate. An evaluation report is, however, a part of a student's record and can be obtained through appropriate procedures.[112]

Obtaining a copy of the evaluation report is important for the advocate. Because the school's report should set forth both a description of the student's needs and suggestions for educating the student, it is a valuable piece of evidence for use at an IEP meeting, at an administrative hearing, or in court, that is, whenever appropriate diagnosis, placement, or programming is at issue. The report of an independent evaluator is similarly important.

The evaluation report should be reviewed to determine whether it meets the following criteria:

- Written in understandable language;
- Identifies tools or processes used in the evaluation;
- Contains a concise statement of specific results;
- Specifies problem areas identified by tests;
- Specifies problem areas identified by behavioral observation;
- Contains a concise statement of strengths and weaknesses;
- Provides information relevant to educational planning; and
- Describes conditions that influence ability to perform school tasks.

Where comparisons to test norms are made, the norms should be described and should be appropriate for the child who was tested. While it may be impractical to urge outright rejection of inadequately standardized tests, the scores and interpretations derived from them should be both reported and read with an understanding of their limitations, including reliability ratings, the characteristics represented or not represented in the sample population, and the possible bias due to the personality and background of the particular examiner.

A standard test administration using the prescribed procedures may be impractical or inappropriate for a particular child because of a special handicap, unusual background, or special characteristics such as bilingualism.[113] Rather than making no attempt to test such children, it may be proper to modify the procedures to enable some testing. In this case, a description of the modifications and their likely effects should be included in the test report. It is important to remember, however, that there is usually no proof of the validity or reliability of such modifications. Of course, where tests appropriate for a given child are available, they are preferable to makeshift, more subjective approaches to testing.

To obtain a complete diagnostic picture, good examiners carefully observe the behavior of the child during the examination. Mention and interpretation of such behavior and its particular context are often valuable additions to a complete and well-documented report.

Reports should usually include some conclusion based on the scores and the suggested interpretations presented in the report. Some examiners will attach a diagnostic label to the conclusion, which may be appropriate if a thorough psychological evaluation has been conducted. Sometimes, however, such labels are improperly applied when there is inadequate information presented in the test results and the report to support them, or when they do not contribute to determinations about appropriate treatment for the condition.

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[110] Sherrer & Roston, *Some Legal and Psychological Concerns About Personality Testing in the Public Schools*, FED. B.J. 115 (1971).

[111] J. SATTLER, ASSESSMENT OF CHILDREN'S INTELLIGENCE (1974).

[112] *See* § 3.5 *supra* (discussion of strategies to obtain access to such information).

[113] *See* § 3.9 *infra* (discussion of bias in testing).

The following questions can be used to assess each item entered into the evaluation report.

3.8.1 RELEVANCE

Is the item relevant to the educational issues at hand? Is it related to the reason for the referral or relevant to some other question pertaining to the child's educational abilities and capacities that has arisen as a result of the referral? Do the items relevant to the issues at hand support the particular diagnosis and treatment recommended by the evaluator or, if not, does the evaluator explain why?

For example, many school psychologists begin a report with the statement that the child is "blonde, blue-eyed, and attractive." In most circumstances, this information is irrelevant to the child's educational problem. Similarly, in many cases, a psychologist includes the number of siblings a child has, the marital status of the persons assuming parental roles, and the age and educational success of siblings. This information is usually not relevant to the child's school adjustment.

3.8.2 SPECIFICITY

Is the information specific to the problem at hand or to the solution being presented? If, for example, the child was referred for an evaluation because of his/her "poor reading ability," does the report specify exactly why the teacher thought that the child had such poor ability? Is the information presented in a clear, precise, and distinct manner?

For example, some reports contain reasons for referral statements that are excessively vague. Language such as "G. was referred because she was unable to do first grade work" should be abandoned in favor of the more specific "G. was referred because she was experiencing difficulty in: (1) following directions; (2) completing tasks; (3) associating letters with their corresponding names and sounds; (4) paying attention for extended periods of time."

The common statements that a child comes from a "poor home," a "culturally deprived home," and the like should be avoided. Instead, but only if the information is relevant to the child's educational problems, the evaluator may enter a specific statement, for example, that according to the teacher's records, the child has come to school on several occasions without a coat on cold days.

3.8.3 SUBSTANTIAL BASIS IN FACT

Is there a substantial basis in fact to support the conclusion of a particular item in a report? If the child has a history of particular problems, a brief description of that history should be entered in the child's record.

If the evaluator concludes that the student suffers from a particular handicapping condition, the report should include a thorough enumeration and analysis of all tests and other data supporting that determination. If a particular emotional or behavior problem is referred to, the report should include the specific manifestations of the problem and a statement of why the evaluator feels that the behavior exhibited is indicative of the emotional problem(s) identified.

The report should avoid vague terms such as "learning disability" or "hyperactivity" for which there is no easily understandable or universally accepted definition. If such terminology is used, the report should include an explanation of why the label is appropriate.

3.9 BIAS IN EVALUATION

Bias on the basis of race, culture, or sex can occur at several stages in the evaluation process:

- The initial referral for evaluation;
- The test instruments or techniques; and
- The interpretation of evaluation results.

Bias in evaluation and in referrals for evaluation are the probable cause for the significant and substantial racial and cultural disproportions in enrollment observed in special education programs, particularly in classes for the educable mentally retarded (which tend to be disproportionately populated with minority students) and the learning disabled (which tend to be disproportionately white and middle or upper class in many southern and urban schools).

The psychological, physiological, and social science debates on the issue of bias in evaluation are almost interminable. The debates were triggered by recognition that, on the average, minority students score lower than white middle class students on norm-referenced tests. With little regard to the premises upon which some of those tests are based, the commentators soon divided themselves into three camps: those who speculate that the difference is primarily due to genetic differences, those who feel the difference results from environmental effects, and those who feel that a combination of both factors cause the differences. More recently the debate has addressed the potential for bias in the test items themselves.

Although the evidence of genetic rather than environmental causes for test performance disparities is far from persuasive, new proponents of the theory or new data presented by old proponents appear with some regularity. However, there has been little, if any, reliance upon this literature by educational agencies or officials.

In contrast, it is generally accepted that environment does affect both ability and achievement. Inadequate prenatal nutrition and medical care can affect a child's potential ability, as can infant nutrition and health. To the extent that minority and low-income families are more subject to poverty-induced nutritional, medical, or other environmental problems, there will be a correlation between race and/or culture and deficits on tests of ability or achievement.

The increasing tendency of educational institutions to rely on standardized psychological tests in making crucial decisions about appropriate treatment and education for children has been widely criticized. Such criticism, recorded in educational and psychological literature and reflected in the increasing judicial involvement in this area,[114] includes claims that standardized tests are scored based on norms derived from predominantly white, middle class population groups and contain items based on white, middle class values, language, learning styles, and experiences.[115]

There are several different techniques for assessing potential bias in tests themselves.[116] There is, however, no consensus within the testing profession on a single method for establishing conclusively that a test is biased. Nevertheless, all would agree that a "test is biased if equally able individuals from different groups do not have equal probabilites of success."[117]

Various attempts to alleviate test bias have been made. Several test producers have renormed tests so that the norm sample will be more representative of the total student population. This process gives minority students the opportunity at least to be compared, in scoring, to a group that is culturally diverse. The renorming process alone has not been sufficient to eliminate disparities in test results, however.

Other efforts have also had limited success. Attempts to formulate "culture-specific" tests that are designed for one particular culture, such as Hispanics, have also failed, in part because there is no cultural uniformity even among distinct cultural/ethnic groups. Finally, direct translation of tests into foreign languages, so that a test may be given in the dominant language of a student, have also failed; translation alters the difficulty of test questions, requiring that the test be entirely renormed and revalidated.

Attempts have been made to develop intelligence tests that assess intellectual abilities without the scores being influenced by the cultural background of the individuals tested. These so-called "culture-fair" tests were intended to control factors that have been thought to lower the performance of culturally diverse children, such as speed, content of the questions, and emphasis on using language. Items were chosen that theoretically required only the knowledge and skills that people from all cultures have equally. Examples of such so-called "culture fair" tests are the Leitner International Performance Scale, the Culture Fair Intelligence Test of Cattell, Raven's Progressive Matrices, and the Goodenough-Harris Draw-a-Person-Test. Nevertheless, research consistently indicates that children from low-income or minority group backgrounds score lower on these tests. Once again these results have been attributed to a variety of factors, including differences in learning styles, societal bias, inequalities in educational opportunities, and unrealistic assumptions which result in test instruments that sample a limited range of school-related skills[118] and omit social skills and other adaptive behavior. At present, there is growing doubt as to whether it is possible to construct a "culture-fair" test.[119]

The most practical approach for determining test bias may be a check of whether or not the test measures past academic achievement and, if so, whether the student has been given a fair opportunity to learn the material or skills assessed by the test. Most standardized intelligence tests are, to some extent at least, measures of past academic achievement and all standardized achievement tests are measures, in large part, of past academic achievement.

The purpose of the educational evaluation is to determine a student's capacity to function in particular academic settings. A student may have the physical, psychological, and mental abilities necessary to function well in a regular school or classroom, yet, due to past history of limited academic training, (s)he may poorly perform on a test. Such weaknesses in academic background do not justify placement in a more restricted environment. On the other hand, if a child is simply unable to learn when exposed to normal academic instruction in a regular classroom, a more restricted environment may be necessary.

Public Law No. 94-142 requires that children suspected of having or determined to have special needs be evaluated using materials and procedures that are neither racially nor culturally discriminatory.[120] In recognition of the problem of eliminating racial and cultural biases, the Public Law No. 94-142 regulations require that a multi-disciplinary team conduct the evaluation which must assess the child in all areas related to the suspected handicap.[121] Decisions cannot be based upon a single test or procedure, and evaluation materials must be tailored to assess specific areas of educational need, not merely IQ.[122] Evaluation procedures must have been validated according to relevant professional standards for the specific purpose for which they are used and must be administered by trained personnel.[123] Furthermore, the materials must be interpreted in a way to reflect accurately what they purport to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills.[124]

Both the implementing regulations under Public Law No. 94-142 and Section 504 of the Rehabilitation Act require that educators draw upon information, including social or cultural background and adaptive behavior, in determining the least restrictive, appropriate placement for a child.[125] By requiring consideration of a child's adaptive behavior, the federal regulations ensure that a child's performance outside the school setting is considered.

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[114] *See* App. A *infra* (case summaries).

[115] J. MERCER, LABELING THE MENTALLY RETARDED (1973); Williams, *Black Pride, Academic Relevance and Individual Achievement*, 2 COUNSELING PSYCHOLOGIST 18-22 (1970); Cohen, *Conceptual Styles, Culture, Conflict, and Nonverbal Tests of Intelligence*, 71 AM. ANTHROPOLOGIST 828-56 (1969); Kleinfeld, *Intellectual Strengths in Culturally Different Groups: An Eskimo Illustration*, 43 REV. of EDUC. RESEARCH 341-59 (1973). *See generally* Bailey & Harbin, *Nondiscriminatory Evaluation*, 46 EXCEPTIONAL CHILDREN 590-95 (1980).

[116] *See* Ysseldyke, *Implementing the Protection in Evaluation Procedures Provision of P.L. 94-142*, EXPLORING ISSUES IN THE IMPLEMENTING OF P.L. 94-142: DEVELOPING CRITERIA FOR THE EVALUATION OF PROTECTION IN EVALUATION PROCEDURES PROTECTIONS (Research for Better Schools, inc., ed. 1979).

[117] Shepherd (1980), *quoted in* EDUCATIONAL TESTING FACTS AND ISSUES: A LAYPERSON'S GUIDE TO TESTING IN OUR SCHOOLS (1980).

[118] Bailey & Harbin, *Nondiscriminatory Evaluation*, 46 EXCEPTIONAL CHILDREN 590-95 (1980).

[119] Laosa, *Nonbiased Assessment of Children's Abilities: Historical Antecedents and Current Issues*, PSYCHOLOGICAL AND EDUCATIONAL ASSESSMENT OF MINORITY CHILDREN 14 (Oakland ed. 1977).

[120] 20 U.S.C.§ 1412(5)(C); 34 C.F.R. § 300.530(b).

[121] 34 C.F.R. §§ 300.532, .540-.543.

[122] *Id.* § 300.532. *See also id.* § 104.35(b).

[123] *Id.* § 300.532(a)(2), (3). *See also id.* § 104.35(b)(1).

[124] *Id.* § 300.532(c). *See also id.* § 104.35(b)(3); § 3.9 *infra* (bias on the basis of handicapping condition).

The importance of considering adaptive behavior cannot be overemphasized, for each test measures only part of the total functioning of the individual. Much "mental retardation" is limited to the school learning situation.[126] Children who are weak in learning at school often function intelligently in social and interpersonal situations.[127] Often IQ test scores result in the school's application of labels such as "mentally retarded," which are stigmatizing and presumed to reflect the total functioning of the individual when in fact they do not. Moreover, because test results are presented in numerical form, they are often considered more exact than they actually are. As Judge Wright pointed out in *Hobson v. Hanson*,[128] "[a]lthough test publishers and school administrators may exhort against taking test scores at face value, the magic of numbers is strong."

Proof that present evaluation instruments and techniques are biased is illustrated by a comparison of the numbers of children, by race and cultural background, in special education classes with the numbers represented in the whole school-age population. There has been in the past a fairly regular statistical pattern, or incidence rate, of handicapping conditions among all races. Therefore, it might be expected that, among all children of all races and cultural backgrounds, the rates of handicapping conditions found in 1968 and set forth in the adjacent box would occur.

INCIDENCE RATES FOR HANDICAPPING CONDITIONS[129]

Category of Handicap	Incidence
Speech impaired	3.5%
Emotionally disturbed	2.0%
Mentally retarded	2.3%
Learning disabled	1.0%
Hard of hearing	0.5%
Deaf	0.075%
Crippled or other health impaired	0.5%
Visually impaired	0.1%
Multihandicapped	0.06%

Total Handicapped: 10.035% of all school age children

These statistical estimates of incidence rates of handicapping conditions can be compared with school, district, or statewide data on the numbers of children being served in special education classes. This data is ordinarily available for each school year. A review of this data indicates the results of racial and cultural bias in the evaluation and placement processes. Many states have extremely high percentages of students identified as learning disabled; these students are almost always white.[130] On the other hand, national data reflects that black students are disproportionately identified and misclassified as mentally retarded. For example, while 1.1% of all white students were placed in programs for the educable mentally retarded in the fall of 1978, 3.5% of all black students were in programs for the educable mentally retarded.[131]

The regulations under both Public Law No 94-142 and Section 504 prohibit the use of evaluation techniques or instruments that are biased on the basis of handicap. Tests must be selected and administered so as to ensure that, when a student has impaired sensory, manual, or speaking skills, test results accurately reflect whatever the test is trying to measure rather than reflecting the student's impaired sensory, manual, or speaking skills unless, or course, that is what the test is designed to measure.[132] One major difficulty with this requirement concerning evaluation is that there are insufficient test instruments, techniques, and trained education evaluators.

Bias in the screening and referral process may account for a large part of the racial and cultural disparities in special education placement. In screening the general population of students to determine which students should be referred for a special education evaluation, educators look for students who deviate from a perception of normal or average behavior. This deviation is measured either by the use of screening instruments, such as reading-readiness, hearing, or visual acuity tests, or by professional judgment. An individual familiar with a particular child, usually an educator but sometimes a parent or social worker, observes a problem that may be symptomatic of a handicapping condition and therefore recommends that the child be formally evaluated. Both referral and screening, to the extent that they rest upon observation and judgment, are highly subjective. Many students are evaluated to determine whether they are handicapped primarily because their behavior deviates from that of average, white, middle-class children. And, because most teachers who make referrals are white, middle-class women, a disproportionate number of those referred are males, since boys engage in so many "acting out" behaviors. Research also indicates that black children tend to be more physically active than white children, a factor which may make it more difficult for white teachers to consider blacks as fitting in well in the white classroom.[133] As a result of these factors, the pool of students who face educational evaluation is disproportionately composed of low-income, minority male students.[134]

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[125] *Id.* §§ 104.35(c), 300.533.

[126] J. MERCER, LABELING THE MENTALLY RETARDED 117 (1973).

[127] SOMPA (System of Multicultural, Pluralistic Assessment) is designed to compare a child's score not only against a national norm group, but also against the scores of children from similar social and cultural backgrounds. The assessment, which is based on information obtained during a session with the child and from an interview with the principal caretaker of the child, examines a child from a biological, social, cultural, and educational perspective. *See* Test Reviews, JOURNAL OF EDUCATIONAL MEASUREMENT 285 (1979). *See also* § 3.7.3.7 *supra*, App. 3E *infra*.

[128] 269 F. Supp. 401, 489 (D.D.C. 1972).

[129] Bureau for Education of the Handicapped, U.S. Dep't of Health, Education and Welfare (1968).

[130] *See* App. 3D *infra* (regional and national data by race, ethnicity, and sex of participants in special education programs).

[131] CHILDREN'S DEFENSE FUND, PORTRAIT OF INEQUALITY OF BLACK AND WHITE CHILDREN IN AMERICA (1980).

[132] 34 C.F.R. §§ 104.35(b)(3), 300.532(c).

A similar form of discrimination occurs when educators assess evaluation results to determine whether special education placement is appropriate. Studies indicate that the physical attractiveness of a student influences the extent to which educators are willing to perceive the student as handicapped.[135]

An advocate who must deal with a situation in which there is possible bias in the evaluation process must determine whether the problem can be resolved for the student being evaluated on an individual basis or whether, in addition, the issue involves system-wide practices, such as mandated use of a particular test instrument. In many situations, the problems faced by a particular student may be eased considerably by simply weighing the evaluation information in light of the potential bias.

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[133] *See* Almanza & Mosley, *Curriculum Adaptations and Modifications for Culturally Diverse Handicapped Children*, 46 EXCEPTIONAL CHILDREN 608-14 (1980).

[134] Ysseldyke, *supra* note 98, at 162.

[135] *Id.* at 157.

APPENDIX 3A
SCHOOL HISTORY FORMAT[1]

(General) General Chronological History of Student's School Placement (Obtain this information on each year the child has been in school; clearly indicate any omissions and the reasons for the omissions) (General)

School Year	Grade	Attendance Record	Progress Reports/Grades	Behavioral Reports	Group Test Data		
					Name of Test	Date	Results
	Provide: Age; School; Teacher(s); Special placement (Specify type and percent of time); Special notes. Transfer data.	Give numbers of days: Present; Absent; Truant; Suspended. Note if reports are sent home, signed, etc. Note any truant, probation officer or others involved by name.	Specify: Type of progress report; Subjects taken; Grades, comments given.	Specify: Type of report; Report location, keeper of report; Results of behavioral reports.	Specify: Level; Form name.		List all results as recorded.

(Individual Tests) Information to Obtain on All Individual Testing of Any Kind Which Has Been Conducted with the Student (Individual Tests)

School Year	Test Administered, Administrator	Date	Specific Recommendations from Testing	Dates/Grades and Recommendations Followed	Changes in Recommendations
	Give: Name of test; Name of examiner and qualifications; Parental permission or not; Discriminatory factors; Language in which conducted; Area or skill assessed; Conclusions based on test results.		List each of the findings and each of the recommendations made.	Across from each specific recommendation, list: If the recommendation was followed; – when? – duration? – by whom? – results? Provide whatever documentation is available	Whenever you determine that changes were made, list: – how determined – by whom – parent notified – reason(s) Documentation

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[1] This chart was prepared by Dr. Lannie LaGear.

APPENDIX 3B
CHECKLIST FOR GATHERING INFORMATION

Individual state plan under Public Law No. 94-142
Minutes of State Advisory Board under Public Law No. 94-142
Any special statistical studies conducted under auspices of state
Monitoring/self evaluation studies under Public Law No. 94-142
Impartial due process hearing synopsis

State Board of Education:
- Budgets
- Minutes
- Policy manuals
- Policy memos
- Curricula manuals
- Studies on normal or atypical populations
- Info on private school placements
- Bureaus of Research & Evaluation
- Bureau of Attendance
- "Needs" statements required under all applications for BEH monies
- Compliance statements, assurances

Local School Districts:
- All same as above under State
- Local plans submitted to state
- Individual/cooperative grant submissions
- Section 504 Self Evaluations
- OCR investigations, reports
- Suspension records
- Records of sex, race, ethnic ratios on classes
- Bilingual records/reports/statistics

Individual Student Records

Other general sources of information:

- Office of Civil Rights Studies and Surveys
- League of Women Voters and other such groups
- Special interest studies regarding all aspects of work with juveniles
- Privately funded local groups grant applications, surveys, interim and final reports

Special interest group services and service/study groups

Parent groups

United States Office of Education

APPENDIX 3C
SCORES FREQUENTLY ASSOCIATED WITH TESTS

SCORES FREQUENTLY ASSOCIATED WITH NORM-REFERENCED TESTS

	DEFINITIONS	MAJOR ADVANTAGES	MAJOR DISADVANTAGES
PERCENTILE RANK	The percentile rank establishes a student's standing relative to a norm group in terms of the percentage of students who scored at or below his or her raw score. For example, a student who scored at the 98th percentile achieved a raw score which was higher than the raw scores of 98 percent of the norm group who took the same test under the same conditions.	1. Percentiles show the relative standing of individuals compared to a normative group. 2. They are familiar to most public school personnel, though probably not the general public. 3. Percentiles are relatively easily explained.	1. Percentiles are frequently confused with the percent of the total number of test items answered correctly. 2. Since the percentile scale does not have equal units of measurement, percentiles should not be used in the computation of group statistics.
GRADE EQUIVALENT SCORE	The grade equivalent score indicates the performance of a student on a particular test relative to the median performance of students at a given grade level and month; e.g., a fifth grader who receives a grade equivalent score of 8.2 on a reading test, achieved the same raw score performance as the typical eighth grader in the second month of eighth grade would be expected to achieve *on the same fifth grade test.*	1. It appears easy to communicate the standing of an individual student relative to a grade level (most people believe they understand what is meant by grade equivalent scores).	1. Grade equivalents are easily misunderstood and misinterpreted. 2. Achievement [levels] expressed in grade equivalent score units cannot be meaningfully compared with each other in several instances. a. Grade equivalent scores cannot be meaningfully compared for the same student (or group of students) over time. b. Grade equivalent scores cannot be meaningfully compared for the same student (or group of students) across subject matter areas. c. Grade equivalent scores cannot be meaningfully compared for the same student (or group of students) across different tests. 3. Many grade equivalent scores are statistical projections (interpolations or extrapolations). In the later grades it is not uncommon to find grade equivalent scores of two or three grade levels above or below the student's actual grade level, but these scores are of doubtful accuracy. 4. The grade equivalent score is not composed of equal sized units. Having equal sized units implies that the underlying difference between any two scores is the same throughout the scale.

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1. These charts originally appeared in Educational Testing Facts and Issues: A Layperson's Guide To Testing in the School, developed by the Northwest Regional Laboratory and the California Department of Education under a subcontract with Nero and Associates, pursuant to contract #400-79-0059, National Institute of Education, U.S. Department of Education.

SCORES FREQUENTLY ASSOCIATED WITH NORM-REFERENCED TESTS

	DEFINITIONS	MAJOR ADVANTAGES	MAJOR DISADVANTAGES
STANDARD OF SCALED SCORE	Standard scores are derived from raw scores, but express the results of a test on the same numerical scale regardless of grade level, subject area or test employed.	1. Since the mean and standard deviation of the standard score scales are prespecified, a student's standard score immediately communicates two important facts about his or her performance on that test: a. Whether the student's score is above or below the mean. b. How far above or below the mean, in standard deviation units, his or performance is.	1. The most useful interpretation of standard scores requires some knowledge of statistics (i.e., mean and standard deviation) and hence may not be appropriate for audiences who have not been exposed to these concepts (e.g., parents, the news media).
		2. The constant numerical scale of standard scores facilitates comparisons: a. Among students taking the same test. b. Across subject matter areas for the same student.	2. Given the variety of standard scores available, there may be potential confusion in expressing the same test performance with so many different numerical values.
		3. Standard scores are derived in a way that maintains the equal interval property in their units which is absent in percentile and grade equivalent scores. Therefore, summary statistics may be meaningfully interpreted when calculated on standard scores.	3. The conversion of raw scores to standard scores may either maintain the shape of the distribution observed, or may transform the distribution to another, more interpretively convenient shape (e.g., the normal distribution); and the procedures employed in specifying the conversion process may not be immediately obvious.
STANINE	Stanines are a standard score scale consisting of nine values with a mean of five and a standard deviation of two. If the distribution of scores is normal, each stanine includes a known proportion of the scores in the distribution.	1. As in all standard scores, stanines have the same meaning across different tests, different grade levels and different content areas. 2. Stanines consist of only nine possible scores and thus may be easier to communicate to audiences not familiar with measurement terminology. Verbal labels may be given to each stanine value to facilitate interpretation.	Since some of the stanines encompass a wide range of scores, their use in reporting can be insensitive to differences [among] students' performances that are more apparent from the use of other test scores.

SCORES FREQUENTLY ASSOCIATED WITH OBJECTIVE REFERENCED TESTS

	DEFINITIONS	MAJOR ADVANTAGES	MAJOR DISADVANTAGES
RAW SCORE	The number of items on a test or subtest answered correctly by the student.	1. Virtually no statistical or measurement expertise is needed to calculate raw scores. 2. Raw scores are the necessary first step in expressing test performance in any of a number of other ways (e.g., standard scores, percentiles.)	1. By themselves, raw scores offer no indication as to how a student who has mastered the skills represented on the test "should" perform (i.e., criterion referenced) or how other students at the same grade level have performed (i.e., norm referenced.)
ITEMS CORRECT	The proportion of the total number of items answered correctly by the student.	1. Very little statistical or measurement expertise is required to understand this expression of test performance. 2. If the content area is sufficiently represented by the items on the test, the percent correct provides an expression of the proportion of the subject matter mastered by the student.	1. No notion of test difficulty or expected performance is contained in this score. Unless accompanied by a standard for mastery or information as to how a student's peers have performed in the test, misinterpretations may arise.
OBJECTIVE MASTERY SCORE	When a standard for mastery has been applied to a set of items for a specific objective, a student's performance in terms of that objective is expressed as having mastery or non-mastery of the objective.	1. The objective mastery score compares the student's performance on that objective to a judged standard of what he or she should know of the skills required to master it. This score can be very useful in diagnosing a student's specific strengths and weaknesses. 2. When the subject matter requires a successive accumulation of skills (e.g., elementary math), objective mastery scores may be extremely useful in monitoring the progress of students in specific skill areas.	1. Objective mastery scores are difficult to compare across different tests. Items designed to measure the same objective may differ in difficulty or have different standards for mastery on different tests. 2. If a purpose in testing is to differentiate among students, objective mastery scores do not present a very useful index. Different raw scores above or below the mastery level are viewed as the same – either mastery or non-mastery.

APPENDIX 3D
KEY TERMS IN TESTING

The following key terms are used throughout the manual and in the following charts:[1]

Concurrent validity: A measure of how well test results correlate with other criteria which might provide the same type of information about test takers.

Content validity: A measure of how well test items represent the knowledge that the test purports to measure.

Construct validity: A measure of how well test items are consistent with the theory or constructs behind the test.

Curricular match or *curricular validity:* A measure of how well a test, particularly an achievement test, represents the objectives and skills taught in the curriculum to which the students have been exposed. Sometimes this area is divided into an analysis of curricular match, i.e. whether the test measures knowledge included in the curriculum objectives and an analysis of instructional match, i.e. whether the test measures knowledge actually covered in the instruction students were offered.

Deviation IQ scores: A score which is intended to reflect the extent to which an individual's IQ score deviates from the mean score of students of the same.

Differential validity: A measure of whether a test has the same degree of validity for various racial, ethnic, or cultural groups. Differential validity is measured by conducting separate validity studies for each such group.

Mean: Any one of several calculated averages, including the arithmetic mean used as a measure of central tendency;

Norm: Standards or criteria for assessing performance on a test; test norms give information about the performance of groups of students on a particular test and thereby provide a set of criteria against which the performance of any individual taking that particular test can be compared; some tests are "normed" on a national basis, some on a local basis, or both;

Predictive validity: A measure of how well test items predict the future performance of test takers. This type of assessment requires an analysis comparing the predictions about each test taker based on the test results with the actual functioning of the test taker at a later point in time as measured on some other score.

Reliability: The degree to which a test or other instrument of evaluation produces consistent results, *e.g.*, on different versions, with various examiners, or at different times;[2]

Standard deviation: A widely used measure of the spread, dispersion, or variability within a group of scores; determined by finding out how much each individual score deviates from the mean of the distribution. The greater the spread of scores about the mean, the larger the standard deviation. IQ tests have an arbitrary mean of 100 and, usually, a standard deviation of 15;

Standard error of measurement: An estimate of the standard deviation that would be found in the distribution of scores for a specified person if (s)he were to be tested repeatedly on the same or a similar test (assuming no new knowledge);

Standardization: The establishment of fixed procedures for administering and scoring a test;

Standardization sample: The group on which a test is normed.

True ability or true score: The value of an observation entirely free from error, or the mean of an indefinite number of observations of a quantity;

Validity: The extent to which a test or other measuring instrument fulfills the purpose for which it is used.

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[1] These definitions are from the *Dictionary of Education* (C. Good, ed. 1973), and the STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS (1974) (known as the "APA Standards") (American Psychological Association, American Educational Research Association, National Council on Measurement in Education). These Standards are the relevant professional standards for education evaluation. The Standards have been adopted by the Equal Employment Opportunity Commission, *see* 29 C.F.R. § 1607, EEOC Guidelines on Employment Selection Procedures, and by the courts, *see Washington v. Davis*, 96 S.Ct. 2040 (1976)) as the criteria for evaluating employment tests.

[2] See § 3.6.2.2 *supra* (discussion of reliability).

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APPENDIX 3E
TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

These charts provide only a brief summary of the information available on the evaluation tools described.[1] The information provided here is solely for the purpose of helping advocates understand evaluation data. The terminology used in the charts is defined in Appendix 3D and in the Glossary of Educational Terms at the end of this book.

This information may assist advocates in questioning evaluators and educators about the evaluation techniques used or the conclusions drawn. However, no advocate should ever rely soley on the information provided here, particularly if there is a dispute with educational officials over evaluation information. An independent evaluator or other expert trained in evaluation is essential in these circumstances.

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[1] The information in these charts was summarized by the author from the eight editions of *MENTAL MEASUREMENTS YEARBOOKS* (O. BUROS ed.) (8th ed. 1978). The YEARBOOKS provide reviews by various experts, of most evaluation instruments used in this country.

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TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
AAMD Adaptive Behavior Scale, 1974 Revision	1969-1975	American Association on Mental Deficiency	Individual Behavior Rating Scale for emotionally maladjusted and developmentally disabled individuals. Adaptive behavior: "the effectiveness of an individual in coping with the natural and social demands of his or her environment."	Standard version: mentally retarded and emotionally maladjusted 3 years—adult; public school version: same, Gr. 2-6.	Two major portions or subsections: (1) independent-functioning; physical development; economic activity; language development; domestic activity; vocational activity; self-direction; responsibility; socialization; (2) violent and destructive behavior; withdrawal; stereotyped behavior; odd mannerisms; inappropriate interpersonal manners; unacceptable vocal habits; unacceptable or eccentric habits; self-abusive behavior; hyperactive tendencies; sexually aberrant behavior; psychological disturbances; use of medication.	Rating scale used to profile individual, then compare to norms; often used to supplement I.Q. test data; no separate data on reliability for public school version; reliability very weak for some areas assessed; validity somewhat questionable
Academic Promise Test	1961-1962	Psychological Corp.	Aptitude	Gr. 6-9	Abstract reasoning numerical; nonverbal; language usage; verbal.	Used for instructional grouping and placement; a cursory assessment which should only be used to supplement other information.
Analysis of Learning Potential (ALP)	1970	Harcourt, Brace, Jovanovich, Inc.	Group Intelligence; prediction of academic performance.	Primary 1 (Gr. 1); Primary 2 (Gr. 2-3); Elementary (Gr. 4-6); Advanced 1 (Gr. 7-9); Advanced 2 (Gr. 10-12).	Reading; math; general composite score.	Compares general learning ability to grade school; one commentator notes that test measures present levels of general educational development or achievement rather than capacity to learn; that there is no proof of predictive validity; that other achievement batteries are preferable; that norms are questionable (Cronbach), another commentator feels it is a good measure of general intelligence; notes that low socioeconomic status children tend to score one standard deviation below middle-class children; recommended use of local norms, notes it correlates highly with tests of academic achievement (Jensen).

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Arthur Point Scale of Performance Tests	1925-1947	Psychological Corp.	Individual Intelligence	4.5 years to Superior Adult	Cube; form board; stencil design; mazes; picture completion.	More a measure of speed-of-motor-performance than intelligence; lacks proof of validation; poorly standardized; sometimes used for deaf children because most of test can be administered with pantomimed instructions, but norms may not be applicable as they were developed on normal children.
Ayres Space Test	1962	Western Psychological Services	Individual Assessment of Spatial Perceptions	3 years and over	Measure of speed; ability to assess spatial relations; used to diagnose brain damage.	Reviews very unfavorable; inadequate standardization data; sometimes used as training or therapeutic tool; no validation data for any use.
Bark's Behavior Rating Scales	1968-1969	Gidon Press	Personality – nonprojective	Preschool and kgn form and elementary and secondary form for Gr. 1-8	Self-blame; anxiety; withdrawal; dependency; ego strength; physical strength; coordination; intellectuality; academics; attention; impulse control; reality contact; sense of identity; suffering; anger control; sense of persecution; sexuality; aggresiveness; resistance; social conformity.	Ratings of problem child made by teacher or parent; nonprojective; no data on reliability; no norms; no reviews.
Basic Educational Skills Inventory (BESI)	1972-1973	B. L. Winch and Associates	Criterion-Referenced Individual Achievement Battery	Gr. K-6	Math and reading (two levels for each, A and B).	Lengthy to administer; no data on reliability; no data on norming process for reading test; no data on validity; very poor reviews; of no use in determining diagnostic or remedial work needed; emphasizes skills learned by rote; interprets test performance in light of "expectancies" based on analysis of commonly used textbooks rather than statistical norms; may be useful for individual teachers who expect same performance as tasks on test.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Basic Concept Inventory (BCI)(Field Research Edition)	1967	Follett Educational Corp.	Individual Criterion-Referenced Assessment of Reading Readiness.	Preschool and Kgn	Basic concepts; statement repetition and comprehension; pattern awareness; total score.	Evaluates prior instruction child has received; used to group for further instruction; primarily intended for culturally disadvantaged, mentally retarded; no validity or reliability data; requires considerable verbalization by child so shyness, dialect, etc. can affect score.
Bayley's Scales of Infant Development (BSID)	1969	Psychological Corp.	Individual Intelligence	2-30 months	Mental Scale; Motor Scale; Infant Behavior Record (emotional personality, social, and sensory development).	Requires very experienced examiner; establishes child's current developmental status compared to others of same age; standardization does not include children from bilingual or limited English-speaking homes; scales have only limited value in predicting later abilities; no data for validity of motor scale; no data on predictive validity of mental scale; better than most other tests for children at this age level.
Bender Gestalt Test (see also Visual-Motor Gestalt Test; Hult Adaptation of the Bender Visual-Motor Gestalt Test for Children; Canter Background Inference Produre for the Bender Gestalt Test; Visual-Motor Gestalt Test, Two Copy Drawing Form).	1938-1970	American Orthopsychiatric Association, Inc.	Individual Projective Measure of Perceptual-Motor Functioning	4 years and over		Widely used to detect brain damage, this original version of the geometric figure replication test has been adapted for further uses through a number of alternative stimulus and scoring techniques (see other tests listed left); this version has low test-retest reliability; low predictive validity; test performance easily affected by fatigue and by care in instructions to examinee; experienced examiner required; performance correlates highly with age, intelligence, education.
Bender Gestalt Test for Young Children (see Bender Gestalt Test) (also known as Koppitz Scoring System for Bender Gestalt Test)	1964	Grune and Stralton, Inc.	Individual Projective	5-12 years		Scoring system developed by Koppitz to assess emotional needs.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Bender Visual-Motor Gestalt Test for Chidren (see Ben der Gestalt Test	1962	Western Psychological Services	Individual Projective	7-12 years		Uses same stimuli as original Bender Gestalt.
Benton Visual Retention Test, Rev. Ed. (Previous edition: Visual Retention Test for Clinical Use)	1946-1955	Psychological Corp.	Individual Intelligence	8 years and over		Tests perception, visuomotor functions, memory for designs, sometimes used to assess brain damage but with no established validity for this use of the test; questionable use as perceptual test.
Blacky Pictures	1950-1967	Psychological Corp.	Individual modified projective test of psychosexual development, personality dynamics	5 years and over	Provides information on: oral eroticism; oral sadism; anal expulsiveness; anal retentiveness; oedipal intensity; masturbation guilt; castration anxiety (males) or penis envy (females) positive identification; sibling rivalry; guilt feelings; positive ego ideal; narcissistic love object; anaclitic love object.	This test is not recommended for use. Subject is shown series of pictures depicting events in the life of Blacky, a dog, and his/her parents and siblings, then asked to tell a story and answer questions about what (s)he sees; insufficient proof of validity or reliability; strong individual differences possible because of differing abilities to identify with dogs; use with female subjects is less successful.
Block Design Test (See Kohs Blocks)						
California Achievement Tests: Lanugage (1970 Edition)(CAT)	1933-1974	California Test Bureau/ McGraw-Hill Co.	English Achievement (Group)	Level 1 (Gr.1.5-2); Level 2 (Gr.2-4); Level 3 (Gr.4-6); Level 4 (Gr.6-9); Level 5 (Gr.9-12).	Auding (listening to stories and indicating which pictures are descriptive. Level 1 only); mechanics; usage and structure; spelling; total.	Can be used alone or in conjunction with CAT math and reading tests; should only be used where areas measured on the test match curriculum and instruction to which the student has been exposed; auding test has very low reliability; at most levels, subtests are too difficult for lower grade level for which they are designated; whether minority groups adequately represented in standardization sample questionable.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
California Achievement Tests: Reading (1970 Edition)(CAT)	1933-1974	California Test Bureau/ McGraw-Hill Co.	Reading Achievement (Group)	Level 1 (Gr.1.5-2); Level 2 (Gr.2-4); Level 3 (Gr.4-6); Level 4 (Gr.6-9); Level 5 (Gr.9-12).	Vocabulary; comprehension; total.	Can be used alone or in conjunction with CAT math and language arts tests; should only be used where areas measured on the test match curriculum and instruction to which the student has been exposed; claims to measure both a student's performance in meeting an objective and a student's performance compared to other students, but only does the latter; standardization completed in February and March, best time to use this test to match norm group on grade levels.
California Achievement Tests: Mathematics (1970 Edition)(CAT)	1933-1974	California Test Bureau/ McGraw-Hill Co.	Mathematics Achievement (Group)	Level 1 (Gr.1.5-2), Level 2 (Gr.2-4); Level 3 (Gr.4-6); Level 4 (Gr.6-9); Level 5 (Gr.9-12).	Computation; concepts and problems; total.	Can be used alone or in conjunction with CAT reading and language arts tests; should only be used where areas measured on test match curriculum and instruction to which the student has been exposed; even at Level 5, measures only basic mathematics at elementary and junior high level, norms questionable if tests not administered in early spring.
California Test of Personalities	1939-1953	California Test Bureau/ McGraw Hill Co.	Personality	Primary (Gr.K-3); Elementary (Gr.4-8); Intermediate (Gr.7-10); Secondary (Gr.9-14); Adult.	Self-reliance; sense of personal worth; sense of personal freedom; feeling of belonging; withdrawing tendencies; nervous symptoms; total personal adjustment; social standards; social skills; antisocial tendencies; family relations; school or occupational relations; community relations; total social adjustment; total adjustment.	Self-report questionnaire.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Canter Background Interference Procedure for the Bender Gestalt Test (BIP; also called BIP Bender Test) (See Bender Gestalt Test)	1966-1970	The Author (A. Canter)	Individual Projective	4 years and over		Bender forms are copied onto jig-saw-lined sheet of paper rather than plain paper, to present background interference; used for diagnosis of organic brain damage.
Cattell Infant Intelligence Scale	1940-1960	Psychological Corp.	Individual Intelligence	3-30 months		Reliability and validity very low; useful only when coupled with other tests on observations of experiences professional; children with relatively high scores at three months tend to remain above average 36 months, but low scores at three months have much less predictive value unless accompanied by other low scores, unfavorable medical history, etc.
Chicago Non-Verbal Examination	1936-1947	Psychological Corp.	Group Intelligence	6 years and over		Administered orally or in pantomime therefore often used for deaf or non-English speakers; standardization poor; validity weak; normed on hearing children; because test attempts to cover a very wide age range, most items are either too easy or too difficult for average examinee.
Children's Apperception Test (CAT)	1949-1961	C.P.S., Inc.	Individual Projective Personality Test	3-10 years	Pictures designed to evoke fantasies relating to problems of: feeding; other oral activity; attitude toward parents and siblings; aggression; fear of being lonely at night; and other childhood experiences.	Ad adaptation of TAT (see below) in the form of animal pictures; studies do not necessarily support authors' assumption that children will respond more productively to the animal rather than human figures; CAT-H adaptation using human figures was developed for children whose mental age is over 10.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Children's Personality Questionnaire (CPQ)	1959-1975	Institute for Personality and Ability Testing	Individual Personality Test	8-12 years	Reserved vs. warmhearted; dull vs. bright; affected by feelings vs. emotionally stable; undemonstrative vs. excitable; obedient vs. assertive; sober vs. enthusiastic; disregards rule vs. conscientious; shy vs. venturesome; tough-minded vs. tender-minded; vigorous vs. circumspect individualism; forthright vs. shrewd; self-assured vs. apprehensive; uncontrolled vs. controlled; relaxed vs. tense.	Low reliability; insufficient data on validity and normative samples; not recommended for dealing with individual children; useful only for research purposes.
Cognitive Abilities Test (CAT)	1954-1974	Houghton-Mifflin Co.	Group Intelligence	Primary 1 (Gr. K-1) Primary 2 (Gr.2-3) Multilevel (Gr.3-12).	Multilevel Edition (Grades 3-12) measures; verbal (vocabulary, sentence completion, verbal classification, verbal analogies); quantitative (quantitative relations, number series, equation building); and nonverbal areas (figure analogies, figure classification, figure synthesis). Primary forms provide only a single score.	This test is a revision and extension of Lorge-Thorndike Intelligence Tests (see below); scores reported as percentile or stanine equivalents or as SAS (standardized age score) or (at lower levels) I.Q.; multilevel edition more a measure of academic achievement than aptitude; norms may be unrepresentative; inadequate proof of construct validity.
Columbia Mental Maturity Scale, Third Edition	1954-1972	Psychological Corp.	Individual Intelligence	3-6 years to 9-11 years	Individual identifies one drawing of a set of three, four, or five drawings printed on large cards.	Used as a quick screening device only; each item consists of a series of pictures, with examinee asked to identify the one that doesn't belong; untimed; age deviation standard scores and percentile and stanine equivalents are provided; no verbal and only minimal motor responses required so test often used with disabled students; handicapped children not included in standardization sample for this version. More validity data, especially regarding the handicapped, needed.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Comprehensive Tests of Basic Skills, Expanded Edition (CTBS)	1968-1976	California Test Bureau/ McGraw-Hill Co.	Group Achievement Test	Level A (Gr. K-1.3); Level B (Gr. K-1.9); Level C (Gr.1.6-2.9); Level 1 (Gr.2.5-4.9); Level 2 (Gr.4.5-6.9); Level 3 (Gr.6.5-8.9); Level 4 (Gr.8.5-12.9).	Level A: alphabet skills; listening for information; letter sounds; discrimination (visual and auditory); language; mathematics. Level C: reading; language; mathematics; science; social studies. Level 1: reading; language; mathematics; reference skills; science; social studies. Levels 2,3,4: same areas as Level 1. Forms S (all levels) and T (levels 1-4) available.	Schools need to establish match between curriculum and content on test; test difficult, so more useful for better-than-average students; very similar to California Achievement Tests used with Short Form Test of Academic Aptitude to compare expected and actual achievement; serious lack of proof of validity and reliability (no data re Form T); high guess factor; some statistical and judgmental efforts to discriminate content bias but results unavailable; evidence lacking to support use as classification or placement test; manual deficient in providing aid for improved instruction.
Cooperative School and College Ability Tests (SCAT)(Series II)	1955-1973	Educational Testing Service (ETS)-Addison-Wesley Publishing Co., Inc.	Group Intelligence	Gr. 4-6, 7-9,10-12, 13-14	Basic verbal and math ability/ achievement.	Often used in conjunction with STEP achievement batteries; sex differences in scores, but no separate norms by sex; reliability data lacking; limited validity data; predictive validity uncertain; verbal and quantitative scores correlated.
Cooperative School and College Ability Tests (SCAT), Series II	1955-1973	Educational Testing Service (ETS) Addison-Wesley Publishing Co., Inc.	Group Intelligence; prediction of academic achievement.	Gr. 9-12	Verbal; quantitative; total.	Meager evidence of predictive validity, other validity; reflects nature and amount of schooling; percentile bands are helpful in interpretation; uncertain effectiveness of verbal or quantitative scores in predicting academic achievement.
Culture Fair Intelligence Test (Also known as IPAT Culture Fair Intelligence Test)(Formerly called Culture Free Intelligence Test)	1933-1973	Institute for Personality and Ability Testing	General Intelligence; partial individual and partial group.	Scale 1 (ages 4-8; M.R. adults); Scale 2 (ages 8-13; & average adults); Scale 3 (Gr. 10-16 and superior adults).	Scales 2 and 3 alike except for difficulty level: series; classification; matrices; conditions.	Paper-pencil test; only four described by test author as culture fair in Scale 1; number and representativeness of sample fall short of desirable standards; marginal reliability; meager proof of validity as "culture fair" test.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Danell Analysis of Reading Difficulty, New Edition	1937-1955	World Book Co.	Individual Reading	Gr. 1-6	Oral reading comprehension and recall; silent reading; word recognition; word pronounciation; spelling; handwriting.	Used, primarily by reading teachers, for diagnosis of reading problems; requires experienced examiner; no data on reliability or validity, norming.
Davis-Eells Test of General Intelligence (Davis-Eells Games)	1951?	Univ. of Chicago?	General Intelligence Attempt at "fair" intelligence test for lower-class urban American children.			Discontinued after initial use in research project because of low predictive validity.
Deep Test of Articulation	1964	Stanwix House, Inc.	Individual Speech Test	2nd grade reading level and under (Picture Form); 3rd grade reading level and over (sentence Form).		Used to direct speech therapy.
Denver Developmental Screening Test (DDST)	1968-1970	Landoca Project and Publishing Foundation, Inc.	Individual Intelligence; early identification of developmental and behavioral problems.	2 weeks-6 years	Gross motor; fine motor-adaptive; language; personal-social.	Screening tool only; must be followed by a more intensive evaluation; "intelligence" assessed in terms of developmental adequacy or inadequacy; used in many Head Start programs; can be given by inexperienced examiner; standardization sample and number inadequate (inadequate inclusion of handicapped, minorities, low income children); low reliability and validity.
Detroit Tests of Learning Aptitude (DTLA)	1935-1975	Bobbs-Merrill Co., Inc.	Individual Intelligence	3 years and over	Pictorial and verbal absurdities; pictorial and verbal opposites; motor speed and precision; auditory attention span; oral commissions; social adjustment; visual attention span; orientation; free association; memory for designs; number ability; broken pictures; oral directions; likenesses and differences. Subtests are chosen depending upon age of person being tested.	Used for disabled readers or for learning disabilities; experienced examiner required; useful for gathering supportive information in a battery of tests; many users question current applicability of norms and the true meaning of different subtest scores; should not be used to determine I.Q.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Developmental Test of Visual-Motor Integration (VMI)(Beert & Buklenica)	1967	Follett Publishing Co.	Individual Visual-Perceptual-Motor	2-8 years (short form); 2-15 years (long form)		Geometric form reproduction test used to assess the integration of visual and motor skills; overlaps with Bender Gestalt Test, Benton Visual Retention Test but probably more carefully standardized than either; lack of data on construct and predictive validity; norming inadequate; relatively high reliability compared to other measures of perceptual-motor skills.
A Developmental Screening Inventory	1966	Hilda Knoblock	Individual Intelligence	1 month-18 months	Adaptive; gross motor; fine motor; language; personal-social.	Screening tool only; no reliability data offered; no reviews available.
Developmental Test of Visual Perception (DTVP)	1964-1966	Consulting Psychologists Press, Inc.	Group Visual Perception	Through 10 years	Eye-hand coordination; figure-ground perception; form constancy; position in space; spatial relations.	Transformed scores are questionably derived; standardization sample inadequate; reliability and total score validity inadequate; generally agreed that five factors measured are not independent of each other; total score to be used with caution in diagnosis; total score relatively reliable for research and theory research.
Devereux Child Behavior Rating Scale	1966	Devereux Foundation Press	Nonprojective Character Test	8-12 years	Distractability; poor self-care; pathological use of senses; emotional detachment; social isolation; poor coordination and body tone; incontinence; messiness-sloppiness; inadequate need for independence; unresponsiveness to stimulation; proneness to emotional upset; need for adult contact; anxious-fearful ideation; "impulse" ideation; inability to delay; social aggression; unethical behavior.	Ratings made by parents, clinicians, child care workers, etc. who have lived closely with child for a period of time; used to group children; provides no validity data and has questionable usefulness.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
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A Developmental Screening Inventory	1966	Hilda Knoblock	Individual Intelligence	1 month-18 months	Adaptive; gross motor; fine motor; language; personal-social.	Screening tool only; no reliability data offered; no reviews available.
Developmental Test of Visual Perception (DTVP)	1964-1966	Consulting Psychologists Press, Inc.	Group Visual Perception	Through 10 years	Eye-hand coordination; figure-ground perception; form constancy; position in space; spatial relations.	Transformed scores are questionably derived; standardization sample inadequate; reliability and total score validity inadequate; generally agreed that five factors measured are not independent of each other; total score to be used with caution in diagnosis; total score relatively reliable for research and theory research.
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Devereux Elementary School Behavior Rating Scale (DESB)	1966-1967	Devereux Foundation Press	Nonprojective Character Test for Problem Behaviors	Gr. K-6	Factor scores: classroom disturbance; impatience; disrespect-defiance; external blame; achievement anxiety; external reliance; comprehension; inattentive-withdrawn; irrelevant responsiveness; creative initiative; need for closeness to teacher. Item scores: unable to change; quits easily; slow worker.	Oriented toward children whose overt behaviors interfere with their academic performance; should be administered only by someone who has had at least one month's experience of direct contact with child in the classroom; provides inadequate proof of validity and reliability.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Diagnostic Reading Tests (DRT)	1947-1974	Committee on Diagnostic Reading Tests, Inc.	Diagnostic Reading Test	Gr. K-13	Grades K-1 Reading Readiness Booklet measures: relationships, eye-hand coordination, visual discrimination, auditory discrimination, vocabulary; Grade 1 Booklet 1 measures: visual and auditory discrimination, vocabulary, story reading; Grade 2 Booklet 2 measures: word recognition, comprehension; Grades 3-4 Booklet 3 measures same areas as Booklet 1; Grades 1-13; Word attack Section; Grades 4-8 DRT Lower Level, (3 parts in 2 booklets) measures: word recognition and comprehension, vocabulary-story reading, word attack; Grades 7-13; DRT Upper Level, (5 parts in 6 booklets) measures: rate of reading; comprehension; vocabulary.	No reviews; inadequate reliability data.
Diagnostic Reading Scale (Spache)	1963	California Test Bureau/ McGraw-Hill Co.	Individual Diagnostic Reading Test	Gr. 1-6	Oral and silent reading skills; auditory comprehension; word lists.	Most valuable information obtained by experienced examiner analyzing kinds of errors; no information on standardization sample; questionable reliability and validity.
Diagnostic Screening Test: Reading (DSTR)	1976	Facilitation House	Individual Diagnostic Reading Test	Gr. 1-12	Comfort level; instructional level; frustration level; comprehension level; phonics/sight ratio; consolidation index; word attack.	Attempts to use scores to adapt reading instruction to student; no data on reliability; inadequate norming.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Differential Aptitude Tests (DAT)	1947-1975	Psychological Corp.	Multiple Aptitude Battery	Gr. 8-12 and adults	Verbal reasoning; numerical ability; abstract reasoning; clerical speed and accuracy; mechanical reasoning; space relations; spelling; language usage.	Test of general intelligence used to predict academic performance and sometimes for career and vocational planning often in conjunction with its Career Planning Package (CPP); questionable differential validity of the subtests severely limits usefulness for vocational guidance; meager evidence of vocational predictive validity; one general verbal comprehension appears to have the highest correlation (among subtests) with all academic work; no reliability data or norms given for adults; potential sex bias (against females) in items; blacks significantly over represented in norming sample.
Draw-a-Man Test; (see also Goodenough-Harris)	1926-1963	Harcourt, Brace, Jovanovich, Inc.	Group or Individual General Intellectual Level; also Individual Projective	3-15 years	Drawing of man, woman and self.	Is not a "culture free' test; correlates with different abilities at different age level; has quantitative and qualitative scoring scales; scoring affected by styles, especially for woman drawing; test-retest reliability high; questionable norms and validity.
Draw a Person (Machover version) or Machover Draw a Person Test		Charles C. Thomas	Individual Projective-Personality Assessment.	children and adults	First drawing of a person, then drawing of the opposite sex. Series of questions about each may be asked.	Experienced clinical examiner; do not use alone; qualitative, composite scoring; drawing ability may affect score; no data on reliability and validity; research questions the sweeping generalizations made by Machover.
Durrell Analysis of Reading Difficulty: New Edition		Harcourt, Brace, Jovanovich, Inc.	Individual Reading	Gr. 1-6	Oral reading comprehension; silent reading with oral recall; listening comprehension; word recignition and analysis; visual memory of word forms; auditory analysis of word elements; spelling and hand-writing; phonics tests of letters and blends. Checklist of reading difficulties	Suited for qualitative evaluation of reading abilities and disabilities; offers remedial suggestions; experienced reading specialist preferred examiner; no specific information on standardization norms, reliability, or validity; useful therefore only in individual reading ability diagnosis.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Early School Personality Questionnaire (ESPQ)	1966-1976, 1963-1976	Institute for Personality and Ability Testing	Individual Personality	6-8 years	Reserved vs. warmhearted; dull vs. bright; affected by feelings vs. emotionally stable; undemonstrative vs. excitable; obedient vs. dominant; sober vs. enthusiastic; disregards rule; vs. conscientious; shy vs. venturesome; tough-minded vs. tender-minded; vigorous vs. circumspect individualism; forthright vs. shrewd; self-assured vs. guilt-prone; relaxed vs tense; poise; independence.	No data on test-retest reliability validity data lacking, especially on value of test as predictor of future behavior; recommended only as research tool, not as tool for individual evaluation.
Eysenck Personality Questionnaire (EPQ)	1975-1976	Educational and Industrial Testing Service	Individual Personality	7-15 years (Junior Form); 16 years and over (Adult Form).	Psychoticism (tough-mindedness), extra-version; neuroticsm, lie (faking well).	Revision of Eysenck Personality Inventory and Junior Eysenck Personality Inventory; validity data available only for psychoticism score; reliability data lacking; scores understandable only with understanding of underlying Eysenck theories of personality; should not be relied upon for individual diagnosis, planning.
Family Relations Test	1957-1976	NFER Publishing, Co., Ltd. (England)	Individual Projective Personality	younger children (3-7 years); older children (7-15 years); adult (for exploring recollected childhood feelings).	Profiles can be developed to describe: idealizing tendency; paranoid tendency; egocentric states; reaction formation; projection; regression; displacement; idealization; denial.	Not recommended for assessment. No normative data; test has apparently never been given to normal children; strong cultural bias; described as "objective" technique for assessing emotional attitudes in children; subject is asked to match statements reflecting likes/dislikes, love/hate, etc. and family members.
First Grade Screening Test	1966-1969	American Guidance Service, Inc.	Reading Readiness	1st grade entrants (2 editions boys and girls)	Intellectual deficiency; central nervous system dysfunction; emotional disturbance.	Quick and simple screening test for identifying first graders who run high risk of academic failure; heavy emphasis on perceptual motor skills; weak validity; separate tests on basis of sex "to allow children to identify with familiar . . . social roles."

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Forer Structured Sentence Completion Test	1957	Weston Psychological Services	Projective Character	10-18 years	Dominant needs or drives; personality trends; reactions to interpersonal relationships; predominant emotional attitudes; direction and amount of aggressive tendencies; total affective level.	Subject asked to complete sentences, and responses are then evaluated; separate editions for boys, girls, men, and women; no norms, no reliability data; no validity data; results almost entirely subjective.
Full Range Picture Vocabulary Test	1948	Psychological Test Specialists	Individual Intelligence	2 years and over		Used to assess verbal ability; children's IQ somewhat overestimates actual ability; no norms for those over age 34; strong cultural bias, particularly against bilingual students; not appropriate for some special populations, such as hearing impaired or ethnic minorities, although recommended for use in rehabilitation settings, particularly with those who cannot communicate orally (since responses are by pointing).
Gates-McKillop Reading Diagnostic Tests	1962	Teachers College Press	Individual Reading Diagnostic	Gr. 2-6	Oral reading; words-flash and untimed recognition; phrase recognition; flash presentation; knowledge of word parts; recognizing the usual form or word equivalents of sounds; auditory blending; spelling; oral vocabulary; syllabication; auditory discrimination.	Recommended for use only with knowledge of normative limitations; experienced examiner can gain much useful individual reading information; also of value in clinical determinations of individual strengths and weaknesses in reading; no reported data on reliability or validity.
Gates Primary Reading Tests (Now revised as Gates-MacGintie Reading Tests, Primary A) see Gates-MacGintie Reading Tests	1926-1958	Bureau of Publications	Reading	Gr. 1-2.5	Word recognition; sentence reading; paragraph reading.	

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Gates-McGinitie Reading Tests	1926-1965 1969-1972	Teachers College Press	Reading	Primary A (Gr. 1); Prim. B (Gr. 2); Prim. C (Gr. 3); Prim. CS (Gr. 2.5-3); Survey D (Gr. 4-6); Survey E (Gr. 7-9); Survey F (Gr. 10-12).	Primary A, B, C: vocabulary and comprehension; Primary CS: speed and accuracy; Survey D: speed and accuracy, vocabulary, comprehension; Survey F: speed and accuracy, vocabulary, comprehension. sion.	Elementary school forms criticized for failure to focus on reading comprehension skills and because skills needed to pass test may not be related to skills needed to read successfully; should not be used alone to make diagnostic decisions or for more than rough estimates of reading difficulties; should be used as screening test only and not individual assessment; validity data lacking; evidence of reliability weak; no actual normative data.
Gates Reading Survey (Now revised as Gates-MacGinitie Tests, Levels Primary C, CS, and Surveys D, E, F) See Gates-MacGinitie Reading Tests	1939-1960	Bureau of Publications	Reading	Gr. 3.5-10	Speed and accuracy; vocabulary; level of comprehension.	
General Aptitude Test Battery (GATB) (also known as USES General Aptitude Test Battery)	1946-1977	States Government Printing Office	Aptitude	Gr. 9-12 and adults, 16 years and over	(GATB) Intelligence; verbal; numerical; spatial; form perception; clerical perception; motor coordination; finger dexterity; manual dexterity.	Developed by U.S. Employment Service for use in occupational counseling; also used by state employment services to measure capacity to learn various jobs; available in version for nonreaders; the GATB-NATB Screening Device used to identify nonreaders who should be given the adaptation; (uses Nonreading Aptitude Test Battery) (NATB). USES Pretesting Orientation Exercises given to disadvantaged persons to prepare for test; Spanish edition of EATB available. Limitations: all tests highly speeded; limited coverage of aptitudes; some questions regarding validity and exclusive use of multiple cut-off in screening procedure; questions as to adequacy of procedure for determining who should take Nonreading Battery. NATB needs improvement.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Gesell Developmental Schedules, 1940 series.	1925-1949	Psychological Corp.	Individual Intelligence	4 weeks to 6 years	Motor; language; adaptive behavior; personal-social.	Frequently used, especially by medical professionals, as criterion-referenced measure follow-up for high risk infants or to predict early childhood intellectual development; mostly observational data obtained by observing child's interaction with stimulus objects; additional information obtained from mother; most useful as supplemental information for identifying early neurological or organic deficits; standardization inadequate; reliability data needed; validity, particularly predictive validity weak.
Gesell Developmental Tests	1964-1965	Programs for Education	School Readiness		Interviews and mainly perceptual-motor tasks; a few oral responses required.	Essentially a clinical examination requiring an experienced examiner; attempts to assess general overall level at which child is functioning; normative samples small; little data on validity and reliability.
Gilmore Oral Reading Tests (GORT)	1951-1968	Harcourt, Brace, Jovanovich, Inc.	Individual Oral Reading	Gr. 1-8	Accuracy; comprehension; rate (Forms C-D). Systematic analysis of specific kinds of errors made in oral reading, e.g., substitutions, omissions, insertions, etc.	Test content somewhat inappropriate for disadvantaged students; best used for noting kinds of errors made; low reliability for comprehension and rate scores; low content validity for comprehension score; inadequate information on standardization groups; comprehension score rests heavily on memory rather than reading comprehension and is misleading since it relies so heavily on oral, rather than silent, reading; rate is not used in determining score, only number of errors.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Goldman-Fristoe Test of Articulation	1969	American Guidance Service, Inc.	Individual Criterion-Referenced Speech Articulation	2 years and over	Sounds in words; sounds in sentences; responsiveness.	Articulation test in which examiner judges the adequacy of speech sounds made by student in picture naming, story repetition, and imitation of sounds; used for diagnosis and instructional planning; expert examiner needed to analyze kinds of errors; further proof of validity and reliability required; may be too lengthy for young or hyperactive children or those with short attention spans; does not adequately sample all speech sounds.
Goodenough-Harris Draw A Man (See Draw a Man Test)						
Goldman-Fristoe-Woodcock Auditory Skills Test Battery (G-F-W Battery)	1974-1976	American Guidance Service, Inc.	Individual test of several auditory perception abilities	3 years and over	Auditory selective attention; diagnostic auditory discrimination; auditory memory; sound-symbol.	Most comprehensive, carefully developed assessment of auditory skills available; used for diagnosis and planning for language or learning disabled students; percentile rank norms not based on sufficient data; weak reliability; further data on construct validity, standardization needed; usefulness diminishes for older age groups (above 9 years).
Goldman-Fristoe-Woodcock Test of Auditory Discrimination	1970	American Guidance Service, Inc.	Individual test of auditory perception of selected speech sounds in words	4 years and over	Auditory discrimination of speech sounds under quiet and noisy conditions.	Forerunner of the G-F-W Battery; may be useful as screening device or as adjunct to other tests when auditory perceptual problems are suspected.
Gray Oral Reading Test	1967	Bobbs-Merrill Co., Inc.	Individual Oral Reading Diagnosis	Gr. 1-college	Forms A, B, C, D permit periodic retesting; grade passage; speed and accuracy; literal comprehension; error analysis.	Scoring so complicated, a tape recording should be made of the reading; experienced examiner required; speed and accuracy considered in scoring; error analysis most useful information obtained; norm sample information inadequate; limited reliability.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Harrison-Stroud Reading-Readiness Profiles	1949-1956	Houghton-Mifflin Co.	Reading Readiness	Gr. K-1	Using symbols; making visual discriminations; using context; making auditory discriminations; using context and auditory clues; giving the names of letters.	Locally developed norms desirable; reliability data lacking; validity data weak.
Henmon-Nelson Tests of Mental Ability, 1973 Revision	1931-1974	Houghton-Mifflin Co.	Group Multilevel Intelligence Battery; school achievement	Gr. K-1; 3-6; 6-9; 9-12.	K-2: listening; vocabulary; size and number. All others: vocabulary; sentence completion; opposites (antonyms); general information; verbal analogies; verbal inference; number series; arithmetic reasoning; figure analogies.	Adequate reliability for use as a group screening instrument; inadequate validity data; questions regarding adequacy of standardization sample.
Hiskey Nebraska Test of Learning Aptitude	1941-1966	Marshall Hiskey (author)	Individual Intelligence for deaf children	3-16 years	Broad patterns; memory for color; picture identification; picture association; paper folding (patterns); visual attention span; block patterns; completion of drawings; memory for digits; puzzle blocks; picture analogies; spatial reasoning.	Specially developed and standardized on deaf and hard-of-hearing children; speed eliminated; uses pantomime, practice exercise, and interesting items; all items chosen to suit deaf children's special limitations; separate norms on deaf and hearing children; moderately high correlations with Stanford-Binet and WISC in groups of hearing children.
Holtzman Inkblot Technique (HIT)	1958-1966	Psychological Corp.	Individual or Group Personality	5 years and over	Reaction time; rejection; location; space; form definiteness; form appropriateness; color, shading; movement; pathognomic verbalization; integration; content (human, animal, anatomy, sex, abstract); anxiety; hostility; barrier; penetration; balance; popular.	Lack of sufficient evidence of validity or data establishing usefulness for decision-making; possible sex bias.
Houston Test for Language Development (HTLD)	1958-1963	Houston Test Co.	Individual Speech	Part 1 (6 months-3 years) Part 2 (3-6 years)	Part I completed by observer of child assesses; accent; melody of speech; gesture; vocabulary; sound articulation; dynamic content; grammatical usage. Part II is a kit which is used to elicit free expressive speech; taps 18 areas.	Not recommended for use, although teacher can learn to administer as an informal estimate of child's language development. No data on reliability for Part 2 and minimal for Part 1; scoring highly subjective; small norm sample, which was all-white and exclusively from Houston, Texas; lack of validity data.

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TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Hunt Minnesota Test for Organic Brain Damage	1943	University of Minnesota Press	Individual Nonprojective Character	Chronological ages 16-70 and mental ages 8 and over	Vocabulary section of 1937 Stanford-Binet, Revised; verbal and nonverbal tests of learning and recall; interpolated tasks.	Measure of intellectual impairment in patients with organic brain damage; standardization group too small; low validity; test creates many "false-positive" scores indicating presence of brain damage when it is not, in fact, there necessitating extreme care in its use.
Hutt Adaptation of Bender Gestalt Test (HABGT) Formerly Known as Revised Bender Gestalt Test (see Bender Gestalt Test)	1944-1969	Grunne and Stratton, Inc.	Individual Projective Character, Personality Test	7 years and over		Slight modification of original Bender figures with new scoring criteria; used for psychodiagnosis of personality and for identifying brain damage; lack of evidence of validity or reliability.
Illinois Test of Psycholinguistic Abilities (ITPA)	1961-1968	University of Illinois Press	Individual Test of Learning Problems	2-10 years	Auditory reception; visual reception; visual sequential memory; auditory sequential memory; visual association; visual closure; verbal expression; grammatic closure; manual expression; auditory closure (optional); sound blending (optional).	Widely used in assessment of learning disabilities, test has provoked widespread controversy; author of test concedes need for reliability and validity data; while title indicates this is a test of linguistic ability, probably more a test of cognitive functioning; commentators indicate more appropriate measures of language behavior are available; many commentators agree ITPA should not be used to categorize or diagnose students as learning disabled or having language or psycholinguistic problems or to plan remedial programs.
Iowa Silent Reading Tests (ISRT)(Rev., 1973)	1927-1973	Psychological Corp.	Reading	Level 1 (Gr. 6-9); Level 2 (Gr. 9-14); Level 3 (advanced Gr. 11-12 and college).	Levels 1 & 2: vocabulary; reading comprehension; directed reading; reading efficiency. Level 3: vocabulary; reading comprehension; reading efficiency.	Recommended for assessment, but not diagnostic purposes; no norms beyond grade 12 provided; norm sample probably not sufficiently representative of lower socioeconomic status students; no predictive or concurrent validity data.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Iowa Tests of Basic Skills (ITBS)	1955-1975	Houghton-Mifflin Co.	Group Achievement	Levels 7-8 (Gr.1.7-2.5); Level 8 (Gr. 2.6-3.5); Levels 9-14 (Gr. 3-9).	Primary Battery, Levels 7 and 8, (Standard Edition): listening; vocabulary; reading comprehension, language skills; work-study skills; mathematics skills. Primary Battery, Level 7 and 8, (Basic Edition): vocabulary; reading comprehension; language; work-study skills; mathematics skills.	One of the most widely used and highly respected educational tests; used to assess basic skills achievement and to improve instruction; should probably not be used for individual diagnostic purposes, since number of items tested in each skill area is small; should only be used where test content matches content of local curriculum and instruction.
Iowa Tests of Educational Development (ITED)	1942-1974	Science Research Associates, Inc. (SRA)	Achievement	Gr. 9-12	Reading (comprehension, vocabulary); language arts (usage, spelling); mathematics: social studies background (optional); science background (optional); use of sources (optional).	Assessment of achievement with limited usefulness as diagnostic tool; should only be used where test content matches content of local curriculum and instruction.
IT Scale for Children (ITSC)	1956	Psychological Test Specialists	Personality (sex role preference)	5-6 years		For research use only.
Kent-Rosanoff Free Association Test	1910	C.H. Stoelting Co.	Projective Personality	4 years and over	Word association test. Stimulus words are 100 common, neutral words.	Word association test in which both response time and nature of response are compared to norms for psychiatric diagnosis; no data on reliability; scores significantly affected by distractions, time pressure, practice, etc.; should not be used for diagnosis; psychiatric screening only; used in research on verbal behavior.
Kahn Intelligence Tests: Experimental Form (KIT)	1960	Psychological Test Specialists		1 month and over	Main Scale, plus 6 options (concept formation; recall; motor coordination; scales for deaf, blind)	Experimental only; often used with verbally or culturally handicapped (separate scales for deaf and for blind); inadequate for first year of life; inadequate standardization.
Key Math Diagnostic Test	1971-1976	American Guidance Service, Inc.	Individual Arithmetic Achievement	Preschool-Gr. 6	Content (numeration, fractions, geometry, symbols); operations (addition, subtraction, multiplication, division, mental computation, numerical reasoning); applications (word problems, missing elements, money, measurement, time); optional metric supplement.	Almost no reading or writing ability required to perform test; widely used for diagnosis, instructional planning especially for the learning disabled.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Kuhlmann-Anderson Intelligence Tests (7th Edition)	1927-1963	Personnel Press, Inc.	Group Intelligence	Booklet K (Kgn.) A (Gr. 1); B (Gr. 2); CD (Gr. 3-4); D (Gr. 4-5); EF (Gr. 5-7); G (Gr. 7-9); H (Gr. 9-12).	Verbal; quantitative; total; and Grade Percentile ranks for Gr. K-4.	Verbal and quantitative scores tend to correlate highly; norming sample somewhat deficient; satisfactory reliability data; adequate predictive validity; insufficient proof that test measures academic potential; scores greatly influenced by speed of performance.
Lee-Clark Reading-Readiness Test	1931-1962	California Test Bureau McGraw-Hill co.	Group Reading-Readiness	Gr. K-1	Letter symbols; concepts; word symbols; total.	Variable predictive validity; should not be sole basis for determining readiness to read; easy and fast to administer.
Leitner International Performance Scale (Arthur adaptation in 1950)	1936-1948	C.H. Stoelting Co.	Individual Intelligence	2-18 years	54 tests yielding mental age and I.Q. scores.	Nonverbal mental age scale; can be given without language since instructions are in pantomime and subject does not need to speak either; of greatest value for children ages 5-12; questionable use for students over thirteen years or under four years; little validity or reliability data; no standardization data; test based upon theory that ability to cope with new situations is best indicator of intelligence; sometimes used to diagnose brain damage; can be adapted for use with multihandicapped; questionable to use with cultural minorities; more valuable when used for clinical diagnosis than for school measures of intelligence by very experienced examiners; Arthur Scale (1950) most useful for ages 3-8 although standardization sample limited.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLI-CATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Lincoln-Oseretsky Motor Development Scale	1955-1956	C.H. Stoelting Co.	Individual Test of Motor Development	6-14 years	All major types of motor behavior, e.g., motor speed, posture, balance, coordination, finger movement, etc.	Little information regarding reliability or validity; overlap of skills assessed.
Lorge-Thorndike Intelligence Tests, (Multi-Level Ed.) (LTIT)	1954-1966	Houghton-Mifflin Co.	Group Intelligence	Gr. 3-13	Verbal; nonverbal; composite.	Widely used; test based upon theory that intelligence is sampled by ability to: interpret and use symbols, deal with abstract and general concepts, deal with relationships among concepts and symbols, organize concepts and symbols flexibly, utilize one's experience in new patterns, and utilize "power" rather than speed in working with abstract materials; resulting I.Q.'s correlate moderately to fairly highly with school achievement and I.Q.'s from other intelligence tests; nonverbal less effective in predicting school achievement for blacks; questionable independence of verbal and nonverbal scores for special populations; lacks data on predictive validity.
McCarthy Scales of Children's Abilities (MSCA)	1970-1972	Psychological Corp.	Individual Intelligence	2.5-8.5 years	Verbal; perceptual; performance; quantitative; general cognitive (composite); memory; motor.	Widely used, but does not meet major standards of test construction; developmental test provides diagnostic profile of abilities and summary score comparable to deviation I.Q. (Binet or WPPSI); high level of skill and experience required of examiner; studies lacking on culture fairness of test; standardization sample included no limited English-speakers; reliability data and validity data, (especially on predictive validity lacking.
Machover Draw a Person Test (or Machover Figure Drawing Test)	1949	Charles C. Thomas	Personality	2 years and over	Examinee is asked to draw a picture of a person and then to draw a person of the opposite sex from that of the first person.	Easy to use and, therefore, subject to abuse; should only be used in conjunction with other techniques; high level of expertise required of examiner; no data on procedures for interpretation, reliability, or validity (especially concerning sex differences).

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Make a Picture Story (MAPS)	1947-1952	Psychological Corp.	Individual Projective Character Test	6 years and over	Examinee selects scenes and figures and then tells stories about them. Eleven backgrounds and as many figures as wished for each background. Stories tell who the figures are, what they are doing, thinking, and feeling, and how things will turn out as on the Thematic Apperception Test (TAT).	No normative data, and very low validity and reliability; not recommended for diagnosis; experienced examiner only.
Maxfield-Buchholtz Social Maturity Scale for Use With Preschool Blind Children	1958	American Foundation for the Blind, Inc.	Nonprojective Individual Personality Test	Infancy-6 years		
Meeting Street School Screening Test	1969	Crippled Children and Adults of Rhode Island, Inc.	Individual Miscellaneous or Learning Disability	Gr. K-1	Motor patterning; visual-perceptual motor; language; total. Based on Osgood's model of information processing.	Screening test requiring experience to administer and score properly; limited diagnostic value; reliability and validity not established; minimal standardization information.
Memory for Designs Test	1946-1960	Psychological Test Specialists	Individual Test for Organic Impairment	8.5 years and over	Examinee copies from memory each of 15 geometric designs.	Subject is required to replicate straight-line designs from memory; used to assess brain damage; has little use in assessing degree of brain damage; should only be used as an adjunct to other measures.
Merrill-Palmer Scale	1926-1931	C.H. Stoelting Co.	Individual Intelligence	24-63 months	Color-matching; peg boards; buttoning; stick-and-string; language; picture formboards; matching; copying; etc.	Standardization on small and nonrepresentative sample; no data on reliability.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Metropolitan Achievement Tests (MAT)	1931-1973	Psychological Corp.	Group Achievement	Primer (Gr. K.7-1, 4th mo); Primary 1 (Gr. 1.5-2.4); Primary 2 (Gr. 2.5-3.4); Elementary (Gr. 3.5-4.9); Intermediate (Gr. 5.0-6.9).	Primer (listening for sounds, reading numbers); Primer 1 (word knowledge, reading, total, word analysis, mathematics); Primer 2 (word knowledge, reading, total, word analysis, spelling, computation, concepts, problem-solving, math, total); Elementary (word knowledge, reading, language, spelling, computation, concepts, problem solving, total, math); Intermediate (same as Elementary, plus science, social studies).	Widely used; nonrepresentative norm group with overinclusion of low-income students; sample was by invitation; test seldom closely matches local curriculum; content geared to curriculum in use in mid-1960's; test items reviewed by minorities for possible bias; only norm-referenced interpretations of results should be made; jointly normed with Otis-Lennon Mental Ability Test to allow evaluation of achievement in relation to scholastic ability. (High correlation of two scores overall indicates MAT may be more a measure of general intellectual capacity than school achievement).
Metropolitan Readiness Test, 1976 Ed. (MRT)	1933-76	Psychological Corp.	Group Reading-Readiness	Level 1 (1st half kgn); Level 2 (2nd half kgn and 1st grade entrants)	Level 1: auditory memory, rhyming, visual skills (letter recognition, visual matching), language listening, quantitative language, total, copying [optional]. Level 2: beginning consonants; sound-letter correspondence; visual matching; finding patterns; school language; listening; quantitative concepts; quantitative operations.	Practice test available; information derived of questionable usefullness to teachers; shows considerable overlap with intelligence test scores; relatively limited behavioral sample; adequate reliability and validity for screening purposes.
Michigan Picture Test	1953	Science Research Associates, Inc.	Individual Projective Personality Test	8-14 years	Tension (frequency of responses showing unresolved conflict); verb tense; direction of forces; combined maladjustment; interpersonal relations; personal pronouns; psychosexual level; popular objects.	Subject responds to twelve picture cards (4 of cards differ on basis of the sex of subject); gross screening device; not satisfactorily validated small standardization sample with all subjects from Michigan; variables do not really discriminate between adjusted and maladjusted.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Minnesota Multiphastic Person Inventory	1943-1967	Psychological Corp.	Individual or Group Personality (measures emotional states and psychopathology)	16 years and over	Hypocondriasis; depression; hysteria; psychopathic deviate; masculinity and femininity; paranoia; psychocasthenia; hypomania; social introversion. These scores are accompanied by 4 validity checks: question; lying; validity; test-taking attitude.	Well-known and widely reviewed and criticized; often used to predict good job performance, although this use is heavily criticized; used for diagnostic and treatment purposes, but is not a reliable or convincing basis for practical decisionmaking; heavily culturally-loaded, with scores of blacks differing considerably from those of whites. (Some normative data available on effect of Socioeconomic Status (SES) and other variables); several different computerized scoring and interpretation systems for MMPI are available; interpretation in a proper manner requires much psychological experience and knowledge.
Minnesota Preschool Scale	1932-1940	Educational Test Bureau	Individual Intelligence	1.5-6 years	Verbal; nonverbal (for ages 3.0-6.0 only); total.	Long test which many preschoolers find uninteresting and too time-consuming.
Murphy-Durrell Reading-Readiness Analysis	1949-1965	Psychological Corp.	Reading-Readiness	1st grade entrants	Sound recognition; letter names (capitals, lower case, total); learning rate; total.	Some directions for test are confusing; learning rate test may not reflect rate at which child learns as much as what child knew before the test; only limited diagnostic use, particularly since test does not measure all elements of reading-readiness; if used at kindergarten level, local norms must be developed.
Nelson-Denny Reading Test Forms C & D (NDRT)	1929-1976	Houghton-Mifflin Co.	Reading Achievement	Gr. 9-16 and adults	Vocabulary; comprehension; total; rate.	Frequently used for screening and diagnosis; more suitable for college than high school students, for whom it is too difficult, in part because of severe time limits; low validity when used with high school students; little support for use as screening device or diagnostic device unless used at college level with locally developed norms and even then, test may be too difficult; (Forms A & B still available).

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Non-Verbal Intelligence Tests for Deaf and Hearing Subjects (Also S.O.N. Snijders-Oomen Non-Verbal Intelligence Scale)	1939-1959	J.B. Wolters (Netherlands)	Individual Intelligence	3-16 years	P Scale (mosaic, picture memory, arrangement, analogies; Q Scale (completion, cubes, drawing, sorting). P and Q can be combined for longer test; P and Q are parallel forms, both of which seek to assess: memory; abstraction; form; and combination.	Administered orally or in pantomime; standardized on Dutch children only; weak validity data.
Otis-Lennon Mental Ability Test	1936-1970	Psychological Corp.	Group Intelligence	Primary 1 (kgn); Primary 2 (Gr. 1.0-1.5); Elementary 1 (Gr. 1.6-3.9); Elementary 2 (Gr. 4-6); Intermediate (Gr. 7-9); Advanced (Gr. 10-12).	General ability in the form of "verbal-educational" intelligence; broad reasoning abilities in abstract manipulation of ideas in verbal, figural, or symbolic form.	Measure of general mental (verbal) ability and scholastic success; standardization not representative on basis of race, culture; national norms available; scores expressed as deviation I.Q.'s or age and grade percentile ranks and stanines, with use of stanines encouraged; three lower levels of test require no reading; lack of validity data, with none for Kindergarten test.
Otis Quick Scoring Mental Ability Tests	1936-1954	World Book Co.	Group Intelligence	Alpha Short Form (Gr. 1.5-4); Beta (Gr. 4-9); Gamma (Gr. 9-12).		Test heavily weighted in favor of academically successful students; should probably not be used for students with clinical (medical, emotional) problems; standard error of measurement is four points; reliability and validity somewhat weak; teacher judgment may be more useful than this test.
Peabody Picture Vocabulary Test (PPVT)(1981-PPVT-R)	1959, 1981	American Guidance Service, Inc.	Individual Intelligence	2-6 to 18 years 1981 version 2-6 to 40 years	Verbal intelligence through receptive vocabulary. Examinee points to one picture of four, which most nearly represents word given.	1959 – All standardizations on white children in Tennessee, therefore seriously limited; limited validity data; moderate reliability. 1981 – Forms L & M (Alternate Forms) The normative sample for 1981 is a much more accurate representation than the 1959 version.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Peabody Individual Achievement Test (PIAT)	1970	American Guidance Service, Inc.	Individual Achievement	Gr. K-12	Mathematics; reading recognition; reading comprehension; spelling; general information.	Validity data lacking, especially on predictive validity; reliabilities too low for diagnosis; some subtest reliabilities adequate for screening purposes; scores obtained: age and grade equivalents, percentile ranks, standard scores.
Picture World Test (PWT)	1955-1956	Western Psychological Services	Individual or Group Projective Character Test	6 years and over	Motivations re goalsetting; integrating and conflicting aspects of emotions, ambitions, and interests; cultural and environmental influences; reactions to life and the world as a whole.	No data on reliability; not well enough developed to be valid for use for individual diagnosis.
Pictorial Test of Intelligence (Also North Central Intelligence Test and Pictorial Intelligence Test)	1964	Houghton-Mifflin Co.	Individual Intelligence	3-8 years	Picture vocabulary; form discrimination; information and comprehension; similarities; size and number; immediate recall; total. Objective, multiple choice format.	Normed only on normal children; questionable appropriateness for low-income children; no data on reliability of subscores; adequate overall reliability and standardization.
Picture Story Language Test	1965	Grune and Stratton, Inc.	Developmental Scale for Written Language	7-17 years	Productivity (total words, total sentences, words, per sentence); syntax; abstract-concrete in written language. Child is presented with a picture and asked to write a story.	Used to diagnose language disorders, learning disabilities; inadequate norming procedures; (all Midwestern children); inadequate reliability and validity data; should be used only in an informal fashion and scores should be interpreted with great caution.
Piers-Harris Children's Self Concept Scale (The Way I Feel About Myself)(CSCS)	1969	Counselor Recordings and Tests	Individual or Group Projective Personality-Self-Concept	Gr. 3-12 (can be used with younger children if examiner reads test to them)	80 first-person simple sentences to which the child answers yes or no. Rating scale requiring examinee to respond to questions about self-perception.	Some reliability data lacking; recommended only for research use.
Pintner-Cunningham Primary Test	1923-1966	Harcourt, Brace, Jovanich, Inc.	Group Intelligence	Gr. K-2		Poor in measurement validity; poor norms.
Pintner General Ability Tests: Non-Language Series	1945	World Book Co.	Group Intelligence	Gr. 4-9	Figure dividing; reverse drawing; pattern synthesis; movement sequence; paper folding.	May be administered in pantomime; validity data lacking.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Pinter General Ability Tests: Verbal Series	1923-1946	World Book Co.	Group Intelligence	Pintner-Cunningham Primary Test (Gr. K-2); Pintner-Durost Elementary Test (Gr. 2.5-4.5); Pintner Intermediate Test (Gr. 4.5-9.5); Pintner Advanced Test (Gr. 9 and over)	Observation; aesthetic comparison; associated objects; discrimination of size; picture parts; picture completion; dot drawing.	Correlates, but not perfectly, with school achievement measures.
Prescriptive Reading Inventory (PRI)	1972-1977	California Test Bureau/ McGraw Hill Co.	Diagnostic Reading	Level 1 (Gr. K.0-1.0); Level 2 (Gr. K.5-2.0); Level A (Gr. 1.5-2.5); Level B (Gr. 2.0-3.5); Level C (Gr. 3.0-4.5); Level D (Gr. 4.0-6.5).	Measures reading achivement on set of specific reading objectives.	Test is not well-designed or practical; should only be used if content matches curriculum to which student has been exposed; was outdated when published in comparison to reading textbooks then available; lack of reliability; insufficient data.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Prescriptive Mathematics Inventory (PMI)	1971-1972	California Test Bureau/ McGraw Hill Co.	Mathematics Achievement	Orange Book (Gr. 4-5); Aqua Book (Gr. 5-6); Purple Book (Gr. 6-7); Level C (Gr. 7-8).		
Pupil Rating Scale: Screening for Learning Disabilities	1971	Grune & Stratton, Inc.	Learning Disabilities	Gr. 3-4	Verbal (auditory comprehension, spoken language); nonverbal (orientation, motor coordination, personal-social behavior).	Teacher rating scale used to screen for learning disabilities; no data on reliability; norms insufficient, especially for children of low socio-economic status; students identified as potentially learning disabled with this test must be subjected to further diagnosis.
Purdue Perceptual Motor Survey	1966	Charles Merrill Publishing Co.	Individual Sensory-Motor	6-10 years	Used to identify children sufficiently lacking in perceptual motor abilities that may have academic difficulty. Eleven subtests with 22 scorable items grouped into 4 areas: balance and posture; body image and differentiation; perceptual motor match; ocular control; form perception.	Not recommended for use. Insufficient proof that skills measured are essential for academic success; lack of validity data; scoring highly subjective and qualitative; authors say not recommended for diagnosis but for controlled observation of child's behavior.
Quick Word Test (QWT)	1957-1967	Harcourt, Brace, Jovanovich, Inc.	Group Intelligence	Elementary Level (Gr. 4-6); Level 1 (Gr. 7-12); Level 2 (college and professional adults).		Quick measure of general ability based entirely on vocabulary items; useful only as a screening device, not for diagnostic purposes; should not be used with special populations or minority students.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Quick Test (QT)	1958-1962	Psychological Test Specialists	Individual Intelligence	2-45 years	Three forms; examinee points to the one picture on a plate of 4 pictures which most nearly represents word read by the examiner. Measures verbal ability only.	A shortend version of Full Range Picture Vocabulary Test designed to provide means of quickly screening of verbal intelligence in practical situations; appropriate only for screening; small all-white sample used to develop norms; inadequate proof of validity.
Ravens Progressive Matrices		Psychological Corp.	Individual or Group Intelligence Test	6.5-8 years	60 designs from which a part has been removed. The examinee chooses the correct insert from 6-8 choices.	Manual quite inadequate; multitude of studies have been conducted; retest reliability for older children and adults was moderate to high except at the lower score ranges; predictive validity for education and occupation is lower than for other I.Q. tests; often used with deaf, questionable appropriateness.
Rhode Sentence Completions Test	1940-1957	Western Psychological Services	Projective Personality	12 years and over		A revision of Payne Sentence Completions; limited norm sample; poor scoring system.
Rorschach Inkblot Test (Also known as Rorschach Rorschach Method, Rorschach Test, Rorschach Psychodiagnostics)	1921-1951	U.S. distributor: Grune & Stratton	Projective Personality	3 years and over	Examinee responds verbally to ten pictures of inkblots, one on each card.	Many variations and scoring methods, with no one generally accepted; interpretations are affected by social class, sex, and ethnic group experiences of examiner; validity data weak; predictive validity particularly weak; for use only by experienced and sophisticated examiner.
Rosenzweig Picture-Frustration Study (or Rosenzweig P-F Study)	1944-1964	Saul Rosenzweig (author)	Projective-Pictorial	Form for children (4-13 yrs); Revised Form for Adolescents (12-8 yrs); Revised Form for Adults (18 yrs and over).	Examinee responds with answer to situations in which one person frustrates another; the situations are depicted in cartoon form.	Forecasts typical reaction patterns (aggression) in potentially frustrating situations; used for diagnostic purposes; norm data tentative and nonrepresentative; reliability low for individual diagnosis; sex bias; should not be used for school purposes.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Rotter Incomplete Sentences Blank	1950	Psychological Corp.	Personality	Gr. 9-12, 13-16, adult	Examinee responds with his "real feelings" and in complete sentences to opening words or sentence stems.	Used as very gross screening for maladjustment; small norm sample; all norms and data based only on college level test; no data to support high school or adult levels of test.
Roughness Discrimination Test	1965	American Printing House for the Blind	Individual Test of Tactile Ability for blind to predict readiness to learn Braille	Gr. K-1		
Screening Tests for Identifying Children With Specific Learning Disabilities (Slingerland)	1962-1974	Educators Publishing Service, Inc.	Group Learning Disabilities Screening	Form A (Gr. 1-2.5); Form B (Gr. 2.5-3.5); Form C (Gr. 3.5-4); Form D (Gr. 5-6)	Forms A,B,C,: visual copying; visual perception-memory; visual discrimination; visual perception-memory; with kinesthetic memory; auditory recall; auditory discrimination of sounds; auditory-visual association. Form D: visual copying, visual perception-memory; visual discrimination; visual perception-memory with kinesthetic memory; auditory recall; auditory discrimination of sounds; auditory-visual association; auditory perception; and individual orientation.	Useful as screening device only, not for diagnosis of specific learning disabilities; no data on reliability or validity; no norms (author recommends local norms).

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Sequential Tests of Educational Progress (STEP)(Series II)	1956-1972	Educational Testing Service (ETS)-Addison-Wesley Publishing Co., Inc.	Achievement Battery	English Expression (Gr. 4-6, 7-9, 10-12, 13-14); Mechanics of Writing (Gr. 4-6, 7-9, 10-12); Mathematics (Gr. 4-6, 7-9, 10-12, 13-14); Reading (Gr. 4-6, 7-9, 10-12, 13-14); Science (Gr. 4-6, 7-9, 10-12, 13-14), Social Studies (Gr. 4-6, 7-9, 10-12, 13-14).	English expression; mechanics of writing; mathematics (mathematics basic concepts and mathematics computation); reading, science; social studies.	Time consuming to administer; norms underrepresent large urban schools; should only be used where content of test matches curriculum to which student has been exposed; correlates very highly with measures of intelligence which means test is only of limited value for diagnostic purposes; considerable overlap in content between tests; more validity needed for English expression test; math tests measure fairly low levels of math content.
Slosson Intelligence Test (SIT)	1961-1963	Slosson Educational Publications	Individual Intelligence	2 weeks & over (only limited use for adults)	For subject over four years, test content stresses; mathematical reasoning; vocabulary; auditory memory; and information. Between 2 and 4 years, test stresses language skills.	Based in part on Stanford-Binet and Gesell Developmental Scales; best use as quick screening device, but test far less suitable than more well-known intelligence tests; weak validity studies; normative sample inadequate; questionable validity.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
SRA Achievement Survey Achievement Series (ACH) (Earlier forms entitled SRA Achievement Series)	1954-1975	Science Research Associates, Inc.	Achievement	Primary 1 (Gr. 1-2); Primary 2 (Gr. 2-4); Multilevel Blue (Gr. (Gr. 4-5); Multilevel Green (Gr. 6-7); Multilevel Red (Gr. 8-9)	Primary: reading; language arts; mathematics; composite. Multilevel: reading (comprehension, vocabulary total); language arts (usage, spelling, total); mathematics (concepts, computation, total); social studies, science, and work-study skills (optional).	Should only be used where test content matches curriculum to which student has been exposed; primary level batteries are well-received by critics; multilevel batteries somewhat less so; accuracy of norms unknown; should not be used alone to diagnose individual strengths and weaknesses of students.
SRA Nonverbal Form (Formerly entitled SRA Nonverbal Classification Form)	1946-1973	Science Research Associates, Inc.	Group Intelligence	12 years and over		Very quick (ten minute) test; no validity data; may be even more heavily culturally loaded than verbal tests of intelligence.
SRA Pictorial Reasoning Test (PRT)	1966-1973	Science Research Associates, Inc.	Group Intelligence	14 years and over	Assesses reasoning with nonverbal, pictorial materials.	Not recommended for use. Designed as a "culture fair" test to measure general mental ability in all major American cultural subgroups through assessment of reasoning with nonverbal, pictorial materials; norm group includes urban blacks and whites from "deprived" neighborhoods, Appalachian whites, Southern rural blacks, Spanish-speaking bilinguals, and French-speaking bilinguals (Canadians); insufficient validity and reliability data.
SRA Primary Mental Abilities, 1962 Edition (PMA)(Earlier editions, Tests of Primary Mental Abilities and Chicago Tests of Primary Mental Abilities)	1946-1969	Science Research Associates, Inc.	Multiaptitude Battery	Gr. K-1; Gr. 2-4; Gr. 4-6; Gr. 6-9; Gr. 9-12; Adults	Gr. K-1 and Gr. 2-4: verbal meaning; perceptual speed; number facility; spatial relations; total. Gr. 4-6: same as above, plus reasoning. Gr. 6-9, 9-12, and adult: verbal meaning; number facility; reasoning; spatial relations; total. Test for adults is identical to that for Gr. 9-12.	Norm sample geographically biased, and with no indication of representation of minority or low-income students; no evidence on sex differences and their significance on test performance; reliability low for some subtests; no separate adult level norms or standardization data makes adult test practically useless; reviewers regard this test as technologically antiquated, with many better alternatives available.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
SRA Short Test of Educational Ability (STEA)	1966-1970	Science Research Associates, Inc.	Group Intelligence	Levels 1-2 (Gr. K-1, 2-3); Levels 3-4 (Gr. 4-6, 7-8); Level 5 (Gr. 9-12).		Approximately 80% of items taken from SPA Primary Ability and SRA Tests of Educational Ability; norms were never separately established but calculated from parent tests; spanish edition available; lack of predictive validity data; is not a satisfactory quick estimate of educational ability particularly for older students.
SRA Tests of Educational Ability, 1962 Edition (TEA)	1957-1963	Science Research Associates, Inc.	Group Intelligence	Gr. 4-6, 6-9, 9-12.	Language; reasoning; quantitative; nonreading (for Gr. 4-6 only); total.	Outgrowth of SRA Primary Mental Abilities Test; scores correlate highly with grade-point averages and achievement test scores; produces an estimate of "ability" heavily influenced by past formal academic experiences; validity data lacking.
Stanford Achievement Test, 1973 Edition (SAT) (1964 edition still available)	1923-1975	Psychological Corp.	Achievement Battery	Primary Level 1 (Gr. 1.5-2.4); Primary Level 2 (Gr. 2.5-3.4); Primary Level 3 (Gr. 3.5-4.4); Intermediate Level 1 (Gr. 4.5-5.4); Intermediate Level 2 (Gr. 5.5-6.9); Advanced (Gr. 7.0-9.5).	All multiple choice. Primary 1: reading (word, comprehension, word plus comprehension); word study skills; mathematics (concepts, computation, and applications, total); auditory (vocabulary, listening, comprehension); total; spelling (optional). Primary 2 same as Primary 1, plus: spelling; social science; science. Primary 3: reading comprehension; word study skills; mathematics (concepts, computation, applications); spelling; language; social science; auditory (vocabulary, listening comprehension. Intermediate 1 and 2 same as Primary 3. Advanced: vocabulary; reading comprehension; mathematics (concepts, computation, applications); spelling; language; social science; science.	Requires 4-5 hrs of testing time; partial batteries available; parallel forms available; widely used and critically accepted; should only be used where test content matches curriculum to which student has been exposed; practice tests available; 1973 content validity is good; manual clear and comprehensive; scores on item groups more appropriate for classes than for individual students.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Stanford-Binet Intelligence Scale (Binet)	1916-1973	Houghton-Mifflin Co.	Individual Intelligence	2 years and over		Test items arranged according to difficulty and age of examinee, who takes only that portion of the test which spans the highest level at which all items are passed to the lowest level at which all items are failed; thus, time and amount of testing varies with each individual; I.Q. scores obtained from Binet are standard scores with mean of 100 and a standard deviation of 16. *See also* §3.6.3.1.
Stanford-Binet Intelligence Scale (Third Revision)	1973	Houghton-Mifflin Co.	Individual Intelligence	2 years and over		Identical with 1960 version, but with new norms.
Stanford Diagnostic Arithmetic Test (SDAT)	1966-1968	Harcourt, Brace, Jovanich, Inc.	Group Arithmetic Diagnostic	Level 1 (Gr. 2.5-4.5); Level 2 (Gr. 4.5-8.5).	Level 1: concepts (counting, operations, decimal place value); computation (addition, subtraction, and, for grade 4 only, multiplication and division); number facts (addition, subtraction, multiplication, division). Level 2: concepts (number system and operations, decimal place value); computation (addition, subtraction, multiplication, division); common fractions (understanding computation); decimal fraction and percent; number facts (addition, subtraction, multiplication, division, carrying).	Designed to diagnose specific weaknesses in working with numbers; norm data lacking, with no proof of sufficient minority or low-income representation; some subtests have extremely low reliabilities; may be suitable for achievement testing, but no direct evidence of diagnostic validity provided.
Stanford Diagnostic Reading (SDRT)	1966-1976	Psychological Corp.	Group Reading Diagnostic	Red level (Gr. 1.5-3.5); Green level (Gr. 2.5-5.5); Brown level (Gr. 4.5-9.5); Blue level (Gr. 9-13).	Red: word reading; comprehension; auditory vocabulary; auditory discrimination; phonetic analysis. Green: auditory vocabulary; auditory discrimination; phonetic analysis; structural analysis; comprehension. Brown: auditory vocabulary; comprehension; phonetic analysis; structural analysis; reading rate. Blue: comprehension; vocabulary; decoding; rate.	Designed to diagnose strength and weakness in reading; limited usefulness; students for whom reading diagnostic testing is appropriate should be referred to experienced diagnosticians.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Symonds Picture-Story Test	1948	Bureau of Publication, Teacher's College, Columbia University	Individual Projective Character	Gr. 7-12	"Psychological (eroticism, altruism, success, craziness, fatigue); "environmental" (punishment, gossip, food, work, appearance). "Psychological" is defined as what you do to another person, "environmental" as what another does to you.	Subjects asked to make up stories in response to 20 pictures, content is interpreted for personality implications; no data on reliability; validity data lacking; should only be used by trained diagnostician.
System of Multicultural Pluralistic Assessment (SOMPA)	1979	Psychological Corp.	Individual Intelligence	5.0-11.11 years	Estimates learning potential on a pluralistic cultural model employing a variety of measures which assume all tests measure learned behavior and are therefore achievement tests and children must be compared only to those who are of similar background.	Uses some standard measures such as WISC-R and Bender Gestalt as well as newly developed measures such as parent interview (Adaptive Behavior Inventory for Children), physical dexterity tasks, health history, measures of weight by height, visual acuity and auditory acuity; white black, and Hispanic children used in standardization sample. *See* §3.6.3.6.
Szondi Test	1937-1965	Hans Huber (Switzerland) Grune-Stratton (U.S. Distributor)	Individual Projective Personality	5 years and over	Homosexual; sadistic; sexual; epileptic; hysteric; paroxysmal; catatonic; paranoic; schizophrenic; depressive; manic.	No verbal responses required; subject selects pictures (s)he "likes" or "dislike" from among pictures of mental patients who depict the conditions described on left; should only be used for research and never for the diagnosis of individuals.
Tasks of Emotional Development	1960-1971	T.E.D. Associates	Individual Personality	Latency: 6-11 years and adolescence; 12-18 years.	Latency: 5 scores (perception, outcome, affect, motivation, spontaneity) in each of 12 areas (peer socialization, trust, aggression toward peers, attitudes for learning, respect for property of others, separation from mother figure, identification with same-sex parent, acceptance of siblings, acceptance of need-frustration, acceptance of parents' affection to one another, orderliness, responsibility, self-image). Adolescence: same, plus heterosexual socialization.	No data on norm group, reliability, or validity. Like all projective techniques, this test produces highly questionable results.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Templin-Dorley Tests of Articulation (TDTA)	1960-1969	Bureau of Educational Research and Service	Speech	3 years and over	Tests child's ability to produce single consonants (initial, medial and final); varying combinations of consonant blends; diphthongs; and vowels.	Highly rated by commentators although norms for 3-8 years olds only; reliability data for screening only; potential for bias since a response is scored as correct only if it represents General American dialect as spoken by Caucasians; speakers of other dialects are penalized; test should only be administered by skilled speech pathologist.
Terman-McNemer Test Mental Ability	1941-1949	World Book Co.	Group Intelligence	Gr. 7-12	Information; synonyms; logical selection; classification; analogies; opposites; best answer.	Revision of Terman Group Test of Mental Ability; primarily a test of verbal intelligence, rather than a measure of general intelligence.
Test for Auditory Comprehension of Language (Carrow)	1973	Learning Concepts	Listening-Individual and Group	3 years 11 months-6 years 11 months.	Screening Test for Auditory Comprehension of Language (STACL) (short group form to identify children who need further testing with long form); Test for Auditory Comprehension of Language (TACL) (long, individual form). Assesses oral language comprehension without requiring expressive language from child.	Measure of language comprehension often used for diagnostic purposes by speech clinicians, although even long form should only be used as screening device; norm group too small; available in English or Spanish, but there are no norms for Spanish version and it must be given by an examiner totally fluent in Spanish.
Thomas Self-Concept Values Test (TSCVT)	1967-1969	Combined Motivation Education Systems Inc.	Individual Nonprojective Character	3-9 years	Value scores: happiness; size; sociability; ability; sharing; male acceptance; fear of things; fear of people; strength; cleanliness; health; attractiveness; material; independence. Self-concept scores, self as subject; mother; teacher; peer.	No reading required by examinee; "under-privileged" subtests score lower on test, evidencing bias; no normative data, low reliability data; should only be used as research tool or for an interview guide, not individual diagnosis.
Torrance Tests of Creative Thinking (TTCT) (Revision of Minnesota Tests of Creative Thinking)	1966-1974	Personnel Press, Inc.	Group or Individual Specific Intelligence (creativity)	kgn-graduate school	12 Tests of 3 areas: verbal battery (entitled Thinking Creatively with Words), auditory battery (Thinking Creatively with Sounds and Words), figural battery (Thinking Creatively With Pictures). All designed to measure fluency, flexibility, originality, and elaboration aspects of creativity.	No norms for verbal scores; examiner must be experienced with the technique; test scores relate highly to academic intelligence and educational achievement test scores, which probably means it is measuring only general academic aptitude (or achievement); insufficient proof of validity.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
The Toy World Test (formerly, The World Test)	1941-1955	dist. by Joyce B. Barsden, 4570 Mont Eagle Place, Los Angeles	Individual Projective Character	2 years and over		Available in American, American-French, German, and French versions; no reliability data. Like all projective tests, the use of this test is highly questionable.
Test of Family Attitudes	1952-1966	Editest	Individual Projective Character	6-12 years	Picture story test where subject reacts to pictures portraying situations between children and adults.	No data on reliability; low rating from commentators. Like all projective tests, use of this test is highly questionable.
Tests of General Ability (TOGA) (Also known as SRA Tests of General Ability)	1957-1960	Science Research Associates, Inc.	Group Intelligence	Gr. K-2 Gr. 2-4; Gr. 4-6; Gr. 6-9; Gr. 9-12.	Information; noncultural reasoning; total.	Norms not geographically representative of southern, southwestern, New England, or northeastern states; small sample; publisher claims Part 2 is culture fair, but no data is presented to support this claim; no predictive validity data; should not be used for subjects at extreme ends of I.Q. scale.
Thematic Apperception Test (TAT)	1935-1943	Harvard University Press	Individual Personality	4 years and over	Subject is asked to tell stories about 20 pictures. Examinee responds orally to a selected set of 20 pictures each of which tap a number of different themes and situations. The subject is asked to tell the situation, the figures, their emotions, and how it will turn out.	No data on reliability; validity data weak; has been replicated in many different forms; should be used only by qualified examiner. Like all projective tests, use of this test is highly questionable.
Utah Test of Language Development, Rev. Ed. (UTLD)	1958-1967	Communication Research Associates, Inc.	Speech	1.5-14.5 years	51 items are selected from other standardization measures.	Measure of maturity of expressive and receptive language skills; sometimes used to assess auditory perceptual problems for ages 8 to 15; norms totally inadequate, especially for nonwhite children; reliability and validity data lacking; preponderence of items at preschool level; results must be viewed with caution.
Van Alstyne Picture Vocabulary Test	1929-1961	Harcourt, Brace, and World, Inc.	Individual Intelligence	2-7 years (Mental Age)		Used as a screening test; should not be used to derive I.Q. scores; sketchy standardization data; weak validity data.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Verbal Language Developmental Scale (VLDS)	1958-1959	American Guidance Service, Inc.	Speech	birth to 25 years	Questionnaire format for receptive and expressive vocabulary. Depends upon observer-informant who knows child.	Extension of communication section of Vineland Social Maturity Scale; used to derive "language age" equivalents; allows only gross estimate of language development; interview of person familiar with child (parent or teacher) which is included may provide information on child's language performance; norms inadequate; test should not be used with inner-city or nonwhite children; validity and reliability data weak.
Vineland Social Maturity Scale	1935-1965	American Guidance Service, Inc.	Individual Personality	Birth to maturity	Self-help; self-direction; locomotion; occupation; communication; social relations.	Measure of "social competence" or adaptive behavior; scores based on interview of a caretaker of child, *may* therefore be of limited reliability; sex and cultural bias; scores questionable; all-white normative sample in one small geographic area in 1935; needs updating; must be used very carefully.
Visual Discrimination Test	1975	Language Research Associates	Individual Learning Disability	5-8 years	Visual discrimination; visual memory; spatial orientation.	Measures ability to discriminate between like nonalphabet shapes; lack of meaningful standardization data; absence of validity data; low reliability; limited usefulness.
Visual-Motor Gestalt Test (VMGT) (see Bender Gestalt Test)	1938-1946	American Orthopsychiatric Association	Individual Projective	4 years and over		
Visual-Motor Gestalt Test Two Copy Drawing Form (see Bender Gestalt Test)	1964	Western Psychological Services	Individual Projective	4 years and over		
Watson-Glaser Critical Thinking Appraisal	1942-1964	Psychological Corp.	Reading-Study Skills, Effective Reasoning.	Gr. 9-16 and adults	Inference; recognition of assumptions; deduction; interpretation; and evaluation of arguments.	No predictive validity data; no reliability data.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Wechsler Adult Intelligence Scale (WAIS)	1939-1955	Psychological Corp.	Individual Intelligence	16 years and over	Verbal (information, comprehension, arithmetic, similarities, digit span, vocabulary, total); performance (digit symbol, picture completion, block design, picture arrangement, object assembly, total); Total.	Spanish edition available; socioculturally biased, particularly toward foreign-born; verbal comprehension perceptual organization, past academic opportunities, and motivation exert great influence on test performance; norms outdated; vocabulary subtest difficult to score. See text, section 3.7.3.2.2
Wechsler-Bellevue Intelligence Scale	1939-1946	Psychological Corp.	Individual Intelligence	10-70 years	Verbal; performance; total.	The Wechsler Adult Intelligence Scale was developed to compensate for the technical difficulties of the Wechsler-Bellevue; the WAIS is not used in its place (see above).
Wechsler Intelligence Scale for Children (WISC) and (WISC-R)	1949-1974	Psychological Corp.	Individual Intelligence	WISC (Original Editon) 5-16 years 6-16 years WISC-R (Revised Edition, 1974)	Verbal (information, comprehension, arithmetic, similarities, digit span, vocabulary, total); performance (digit symbol, picture completion, block design, picture arrangement, object assembly, total); Total. Verbal; performance; total.	Downward extension of Wechsler Bellevue Intelligence Scale (Form 2); spanish edition available for original edition; two versions substantially identical in content, although some culturally unfair items have been eliminated and pictures of minorities have been added to stimulus materials; WISC-R renormed with sample which is more representative of minorities but may not be sufficiently representative; WISC-R generally yields lower scaled scores than WISC; sex role stereotyping in test questions; some subtest scaled scores have very low reliability. See text, Section 3.7.3.2
Wechsler Preschool and Primary Scale of Intelligence (WPPSI)	1949-1967	Psychological Corp.	Individual Intelligence	4-6.5 years	Verbal I.Q. (information, vocabulary, arithmetic, similarities, comprehension, *sentences); performance I.Q. (animal house, picture completion, mazes, *geometric design, block design); Total I.Q. (*newly constructed)	Commonly used intelligence test for young children; more carefully developed than most such tests; 8 subtests are downward extensions of WISC subtests and the other 3 are newly-constructed (see subtests); may be too long for very young children; has greater predictive validity than Peabody, Bender Gestalt, or Draw a Person; has limited usefulness differentiating between moderately and severely retarded; normed and standardized on 1960 U.S. Census. *See* §3.6.3.3.

TESTS USED IN PSYCHO-EDUCATIONAL EVALUATIONS

NAME OF TEST	DATE OF PUBLICATION	PUBLISHER	TYPE	AGES TESTED	MEASURES OR SUBTESTS	COMMENTS
Wepman (Auditory Discrimination Test)	1958-1973	Language Research Associates	Auditory Discrimination	5-8 years	Child responds to word pairs, telling the examiner if the word pair is the same or if it is different.	Orally administered; validity data lacking; should be used as a screening device only; no description of normative sample given in manual; child sometimes fails because does not understand "same" and "different" directions.
Wide Range Achievement Test (WRAT)	1940-1976, 1978	Guidance Associates of Delaware, Inc.	Achievement Battery (part individual, part group)	5-11 years; 12 years and over	Both levels: reading (word decoding only); spelling (dictated words only); arithmetic (computational skills only).	No representative national norms; impractical for general school use; use as screening for very general basic achievement levels only; should not be used alone for educational placement decisions.
Wisconsin Contemporary Test of Elementary Mathematics (WCTEM)	1967-1968	Personnel Press, Inc.	Mathematics Achievement	Gr. 3-4 and 5-6	Facts; concepts; total.	Does not assess problem-solving; Concepts section less reliable than Facts section; test must be carefully matched to curriculum student has been offered; norms may be heavily weighted in favor of high socioeconomic and high ability students.
Woodcock Reading Mastery Tests (WRMT)	1972-1973	American Guidance Service, Inc.	Individual Diagnostic Reading	Gr. K-12	Letter identification; word identification; word attack; word comprehension; passage comprehension.	Claims to be both norm-and-criterion-referenced test but latter claims are weak; best used as a global screening measure for reading disability and not for more specific determinations; reviewers divided on adequacy of reliability and validity data; high level of sex bias (against females) in test items; special norms adjusted for sex and socioeconomic status are available, although adjustments are time-consuming.

CHAPTER 4

PLACEMENT AND PROGRAMMING

4.1 INTRODUCTION

The most important stage of the special education decisionmaking process is the phase in which the educational program and school placement for a student are determined. Here, the student's needs, strengths, and weaknesses are analyzed to determine what educational setting is most appropriate for him/her and what programs and services should be provided. Finally, the programming and placement process should define specific long and short term educational goals for the student, along with a plan for achieving those goals.

Once evaluative information concerning a child has been gathered, a decision must be reached on what type, if any, of special educational program should be developed for the child. The decision should be made by a team composed of a representative of the local educational agency who is a qualified special educator or special education supervisor, the teacher, the parents or guardian of the child, and, "where appropriate," the child.[1] Other individuals may participate in the team meeting at the discretion of the parent or the agency. Also, when the child is being evaluated for special education for the first time, the meeting must be attended by either a member of the child's evaluation team or by someone familiar with the procedures and results of the child's evaluation.[2]

Parental participation is critical in deciding programming and placement, and parents should be equal partners with professional educators in the decisionmaking process. Educational officials are required to take steps to insure that parents are either present at each meeting to develop their child's IEP or are given a chance to participate at some point in the decisionmaking.[3] Parents are to be notified of the meeting early enough so that they can attend; the notice must indicate the purpose, time, and location of the meeting and, consistent with requirements for full disclosure of proposed agency action, should detail who will be in attendance.[4] Programming and placement (or IEP) meetings should be scheduled for a time and place mutually acceptable to family and school. A meeting may be held without parents in attendance only if the school was unable to convince parents to attend and can document its efforts to urge parental participation.[5] If parents are unable to attend a placement meeting, then parental input into decisionmaking through phone calls or individual conferences is required.[6]

The purpose of the placement conference or individualized education program (IEP) team meeting is to review student evaluation information collected from all sources, to determine the child's needs and eligibility for special education programs and services, to develop an IEP, to recommend an appropriate placement, and to monitor and evaluate the continuing appropriateness of the child's evaluation, placement, and programming. The IEP team should be an on-going group, meeting first to determine initial placement and then, if the team finds that the student is handicapped and needs special education, reconvening at least annually to review the student's progress and to update and revise the IEP.

One of the most important factors in the child's educational success is his/her IEP, the program designed both to provide the student with an appropriate education and to act as the written document describing the program. Public Law No. 94-142 requires the development of an IEP each year[7] for each handicapped child, including handicapped children not receiving special education and those referred to or placed by the state or school district in private schools.[8] The IEP should be designed and written at the planning conference held to recommend an educational placement for the child.

While this written plan is not a binding contract according to the federal government,[9] it is extremely important for two reasons. First, the attempt to formulate the IEP should result in an articulation and clarification of the differences of opinion among various educators and family members. Second, the completed IEP should serve as guide for the family and advocate in monitoring the educational progress of the child.

4.2 INDIVIDUALIZED EDUCATION PROGRAMS (IEPs)

The most important function of the placement meeting is to formulate a written IEP for the child. The written program summarizes the evaluative data obtained about the child and describes the educational program and services which will be provided to meet the child's individual needs. Public Law No. 94-142 clearly specifies the required contents of an IEP. An IEP must contain:

- A statement of the child's present levels of educational performance;

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[1] 20 U.S.C. § 1401(19); 34 C.F.R. § 300.344

[2] 34 C.F.R. § 300.344.

[3] *Id.* § 300.345(b)-(d).

[4] *Id.* § 300.505.

[5] *Id.* § 300.345(d).

[6] *Id.* § 300.345(c).

[7] 20 U.S.C. § 1414(5).

[8] 34 C.F.R. § 300.348.

[9] *See* 41 Fed. Reg. 56,970 (1976) (comments to proposed regulations). The comments suggest that, while the educational agency is responsible for providing the services described in the IEP, the agency does not violate the regulations if the child does not achieve the goals and objectives set forth in it.

- A statement of annual goals, including short-term instructional objectives;
- A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;
- The projected dates for initiation of services and the anticipated duration of the services; and
- Appropriate objective criteria, evaluative procedures, and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.[10]

In composing the IEP, the placement team should address the program to the particular needs of a single child. The program should not, therefore, be written according to any formula developed for groups, categories, or classes of children. Students should not be fitted into existing programs but instead should be provided with programs to meet their individual needs, even if it means exercising considerable creativity to construct the programs.

Many advocates have found that they must take the initiative in searching for available programs and services and in determining the means for delivering them to the student. Often, even the school employees who are members of an IEP team will not know the extent of the programs and services available via the school system and other agencies. Personnel in one school building, for example, may not know of programs or services available from another school; special education personnel may be unfamiliar with programs and services available in the so-called "regular" program through such programs as work-study or compensatory or adult basic education. The advocate cannot rely upon school employees to know the full range of programs and services available; (s)he must often conduct fairly detailed investigations to discover what alternatives are available.

In addition, the advocate may often have to counteract the natural tendency of school officials to rely upon established and familiar patterns of dealing with students. If, for example, the long-standing practice has been to put educable mentally retarded (EMR) students in a full-time, self-contained (segregated) special education classroom, school personnel may tend to assume that such placement is appropriate for all EMR students and may find it difficult to accept other arrangements.

Finally, many school personnel are unfamiliar with programs and services offered by public or private social service agencies. Because the advocate can function as an outside observer, it is often easier for him/her than for school personnel to find creative solutions to the problem of delivering appropriate, individually-tailored programs and services to handicapped students.

The tendency of educators to be bound by past practices and by the labels used to describe handicapping conditions reflects a major problem in special education and in Public Law No. 94-142. Many of the difficulties in providing appropriate educational services to handicapped students are directly linked to the failure to tailor educational programs to individual needs. To place a label, such as "educable mentally retarded," on a student may be to determine in advance the educational treatment the student will receive. Educable mentally retarded (EMR) students, for instance, are frequently placed in classes in which all the students are subjected to a uniform EMR curriculum. In addition to not having individualized educational programs, handicapped students are thus saddled with labels which may deny them individually appropriate educational programs and may also serve to further handicap students due to the stigma associated with them.

Although one congressional goal behind both Public Law No. 94-142 and Section 504 was the elimination of the stigmatization of handicapped persons, Public Law No. 94-142 has done little to eliminate the problem and, in fact, fosters it. Both Public Law No. 94-142 and its implementing regulations categorize and label the handicapped. The definitions of individuals covered by the law and its regulations list categories of handicapping conditions. The emphasis on individualization elsewhere throughout Public Law No. 94-142 and its implementing regulations is convincing evidence that Congress intended to limit the use of labels to persons entering for the first time a population covered by the law. Once the determination is made whether an individual falls within the category of persons covered by Public Law No. 94-142, the relevant legal label serves no purpose and should be dropped. In fact, to ensure individual appropriateness of programs and services, it is essential that the label be dropped.

The label applied to a handicapping condition is only important in three limited instances:

- In determining whether a student is eligible for coverage under a particular state or federal law (particularly Public Law No. 94-142);
- In counting students for reporting purposes under state or federal requirements; or
- In determining, for people between the ages of 3 through 5 and 18 through 21, whether there is an entitlement to free, appropriate public education.[11]

Aside from these circumstances, the label of disability or handicapping condition is unimportant and, due to the stigmatizing impact of such labels, should be avoided.

Some controversy exists over whether an IEP must contain, as part of the described program of services a child requires, descriptions of elements which are appropriate to a child's needs but which are not immediately available. Proposed regulations under Public Law No. 94-142 suggested that they must,[12] but the final regulations indicate that the IEP need only state the specific education and related services provided.[13] In an attempt to clarify the federal government's position in the matter, the United

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[10] 20 U.S.C. § 1401(19); 34 C.F.R. § 300.346.

[11] See § 4.11 *infra*.

[12] 41 Fed. Reg. 56,986 (1976) (to be codified at 34 C.F.R. § 300.225).

[13] 34 C.F.R. § 300.346.

States Office of Education's Bureau of Education for the Handicapped[14] stated in a policy letter to chief state school officers that Public Law No. 94-142 and Section 504 of the Rehabilitation Act of 1973, when read together, "require that by September 1, 1978, each handicapped child must be provided *all* services necessary to meet his/her special education and related needs."[15] It is important to seek inclusion in the IEP of all elements considered appropriate for an individual child's needs. While the IEP is not a binding contract between the family and the school district,[16] it sets the standard against which initial determinations of the appropriateness of a child's program will be made. As such, the IEP may serve a useful function in administrative or judicial review of individual special education complaints. More important, the IEP serves as parents' and advocates' means of monitoring the implementation of and progress in a student's educational program.

The United States Department of Education has issued a policy interpretation which, among other things, lists six purposes for the IEP:

- The IEP meeting serves as a communicative vehicle between parents and school personnel and enables them, as equal participants, to decide jointly what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be;
- The IEP process provides an opportunity for resolving any differences between the parents and the agency concerning a handicapped child's special education needs: first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parents;
- The IEP sets forth in writing a commitment of resources necessary to enable a handicapped child to receive needed special education and related services;
- The IEP is a management tool that is used to ensure that each handicapped child is provided special education and related services appropriate to the child's special learning needs;
- The IEP is a compliance and monitoring document which may be used by authorized monitoring personnel from each governmental level to determine whether a handicapped child is actually receiving the free appropriate public education agreed to by the parents and the school; and
- The IEP serves as an evaluative device for use in determining the extent of the child's progress toward meeting the projected outcomes.[17]

The paucity of special education programs and services appropriate to the student's individual needs is a major problem in programing for handicapped students. While the declared purpose of Public Law No. 94-142 is to "assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs,"[18] the goal is not presently being met and cannot be expected to be met for several years. In school districts with low densities of handicapped students in the school-aged population, such as rural districts, the availability of programs and services will be an on-going problem. Quite often, services are available but require the student to be transported long distances each day, placed in a special school for the handicapped, or placed away from home in a residential program. Each of these alternatives represents movement from a lesser to a more restrictive environment, and often the child could remain in the less restrictive environment if (s)he lived in a school district with a higher density of handicapped students.

The task of balancing the requirement that students be placed in the least restrictive environment possible against the requirement that students receive an appropriate education involves consideration of the type of program and services that will be best for the child. It will be difficult to proceed in this area without relying heavily on the expertise of school officials, unless the student and family have an outside expert serving as an advisor or unless very intuitive judgments are made. Unfortunately, quite often even educators cannot determine what will be the most effective approach to use with a child. In many instances, a trial and error approach will be necessary, with on-going monitoring of the effectiveness of the various alternatives tried.

The legislative history of Public Law No. 94-142, the Education for All Handicapped Children Act, indicates that Congress intended the IEP to serve as an educational plan and its development to serve as an opportunity for joint input by all individuals concerned with the child's education. The general definition that emerged from the Joint Explanatory Statement of the (Congressional) Committee of Conference is: "a written statement — including the educational status of the child, the annual goals and short-term instructional objectives and specific educational services to be provided for each handicapped child which is jointly developed by the local educational agency, the teacher, the parents, and the child, whenever appropriate."[19] This language is similar to the definition of the individual education program found at 20 U.S.C. § 1401(19). Comparable language is contained in the regulations to Public Law No. 94-142.[20]

The statutory and regulatory language used to define an IEP combines the House and the Senate's concepts of an IEP and what it is intended to achieve.

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[14] With the creation of the cabinet-level Department of Education in May, 1980, this organization became the Office of Special Education in that Department.

[15] Letter from E. Martin, Chief, Bureau of Educ. for the Handicapped, U.S. Office of Educ., to Chief State School Officers (Nov., 1977).

[16] 34 C.F.R. § 300.349.

[17] U.S. Dep't of Education, "Assistance to States for Education of Handicapped Children; Interpretation of the Individualized Education Program," 46 Fed. Reg. 5460, 5462 (Jan. 19, 1981). The Reagan administration has published a notice of intent to review this policy interpretation. 46 Fed. Reg. 19,000 (1981).

[18] Pub. L. No. 94-142, 3(c), 89 Stat. 775 (1975).

[19] S. Conf. Rep. on S.6 (Nov 14, 1975), S. Rep. No. 455, 94th Cong., 1st Sess. *reprinted in* [1975] U.S. Code Cong. & Ad. News 1480, 1482.

[20] 34 C.F.R. § 300.346.

The Senate version of the bill referred to the IEP as an "individualized planning conference," which was to be a "meeting or meetings for the purpose of developing a written statement."[21] The Senate considered the group interaction among all concerned with the child's education as an important aspect of defining the handicapped child's special needs. The House version, however, provided the IEP its present name and was concerned with the actual plan which resulted from the meetings. Both of these objectives were incorporated into the law and are essential to the development of an adequate IEP. They are both clearly provided for in the definitions.

4.2.1 PURPOSES OF THE IEP

Legislative intent as to the function of the IEP indicates three essential purposes. The first and most obvious is to benefit the child. Congress recognized the importance of individual attention if the needs of the handicapped child are to be adequately met. Senator Jennings Randolph stated: "It has long been recognized by educators that individualized attention to a child brings rich rewards to the child."[22]

Representative Albert Quie clarified this in regard to the handicapped child in stating: "Not every handicapped child is the same; and by designing educational programs which specifically address specific needs and problems, I believe that handicapped children will benefit more from our educational programs."[23]

Thus, an essential purpose of the IEP is to focus individual attention on the child and develop an educational plan to meet special needs. However, there is also an indirect benefit from this demand for individual attention. Unless profoundly disabled, a handicapped child's needs are often ignored when (s)he is placed in the normal classroom setting. Attention is directed to the group and the handicapped child becomes lost in the crowd. The IEP can help to alleviate this problem. In defining the objectives of the IEP, Senator Randolph stated that the IEP is "a way of targeting the resources of our school systems on handicapped children."[24]

The second function of the IEP is to benefit the parents of handicapped children. This purpose is two-fold. First, the IEP provides valuable parental input into the development of the educational plan to be used by the child's teacher. Second, the parents should also obtain useful information. Senator Harrison Williams indicated that the IEP planning conferences "serve as a method of providing additional parent counseling and training so that the parent may bolster the educational process at home."[25] The development of any child is a 24-hour-a-day process, and it is important that parents continue what is begun in school. Parents of handicapped children are sometimes unaware of their children's special requirements and may need additional information so that they can contribute toward the child's development at home. As stated by Representative Quie: "by involving the parents in the development of such plans, the benefits begun in school hopefully would be continued at home."[26]

In this sense, the parents' participation in the development of the IEP is essential. If the process denies parents familiarity with the child's needs and the services to be provided, it essentially denies benefits to the child as well.

The regulations under Public Law No. 94-142 reflect this objective by expressing concern over parental participation. They provide:

> (a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:
>
> (1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and
>
> (2) Scheduling the meeting at a mutually agreed on time and place.
>
> (b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.
>
> (c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.[27]

If parents do not attend, the meeting may proceed as long as the absent parents are given an explanation of the proceedings and a copy of the IEP. While these assurances guarantee parents their rights to procedural protections, they are an inadequate substitute for parental participation. Therefore, schools must make every effort to comply with these provisions of the regulations to insure parental participation.

Finally, the IEP can benefit and serve the teacher. Despite their experience in special education, teachers need additional insight into the unique needs of each handicapped child. Furthermore, often teachers with less experience fear the problems a handicapped child may introduce into the classroom. Participation in the IEP developmental meetings should alleviate some of these apprehensions by introducing the child and parents to the teacher outside the classroom. This is reflected in legislative history. In defining the purpose of the IEP, Senator Robert Stafford stated:

> Not only will the child be better served and the parents better informed of the limitations of the child . . . but the teacher will learn from the experience as well . . . the teacher needs reinforcement and a better understanding of the child's abilities and disabilities. It is hoped that participation in these conferences will have a positive effect on the attitude of the teacher toward the child. . . .[28]

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[21] [1975] U.S. CODE CONG. & AD. NEWS 1480, 1484.

[22] Senate Floor Debate on S.6, 121 CONG. REC. S10,955 (daily ed. June 18, 1975).

[23] 121 CONG. REC. 37,026 (1975).

[24] 121 CONG. REC. S10,970 (daily ed. June 18, 1975).

[25] *Id.*

[26] 121 CONG. REC. H7152 (daily ed. June 18, 1975).

[27] 34 C.F.R. § 300.345(a)-(c).

[28] 121 CONG. REC. S10,961 (daily ed. June 18, 1975).

These three important purposes of the IEP indicate that it is not to be paperwork merely submitted to parents for their approval or rejection. Individual participation in developing the plan is almost as important as the plan itself. A plan developed by a specialist or a computer would not necessarily benefit the child since it would ignore the other requirements outlined by legislative history, namely, informing parents and teachers and involving them in the decisionmaking, so that the IEP can be formulated by using all available information about the student.

4.2.2 THE IEP MEETING AND ITS PARTICIPANTS

The meeting at which the IEP is written, called a "staffing" in many schools, has a specified list of participants. According to the regulations implementing Public Law No. 94-142, the participants at an IEP meeting must include, at least:

- The student's teacher;
- Some representative of the school, other than the teacher, who is qualified to provide or supervise special education;
- When the student is evaluated for the first time, a member of the team which evaluated the student or someone from the school familiar with the evaluation, who cannot be one of the other educators required to be present;
- One or both parents; and
- When appropriate, the student.[29]

In addition, the parent and the school each have the discretion to bring other individuals to the meeting.[30]

The individual who attends the IEP meeting as the student's teacher may be one of a number of people, depending on the circumstances. For a student who has not previously been receiving special education and has been attending regular classes, the student's teacher should be the regular classroom instructor. However, if the student is being considered for special class placement, the student's teacher could be, according to HEW's comments to the regulations,[31] the special education teacher with whom the student might be placed. In some instances, where special education placement is not necessarily ensured and the parent is either uncertain about or opposed to special class placement, having a special education teacher perform the role of student's teacher in the IEP meeting may result in too much of the discussion being directed toward a presumed special education placement.

For a student who has previously received special education, the professional serving in the role of the student's teacher can be the student's special education teacher. A teacher can be someone not ordinarily called a teacher. For instance, if a student had only been receiving speech therapy services, the student's teacher could be the speech therapist.

For a student who has not been in school or who has more than one teacher, either regular or special, one person from the teaching staff may be designated to attend the IEP meeting. Either the teacher or the agency representative at the meeting must be qualified as a specialist or teacher in the area of the student's suspected disability. For example, if a student is thought to have symptoms of educable mental retardation, one educator representing the school should be certified as a special teacher for the educable mentally retarded.

Teacher participation at IEP meetings is a highly contested issue among teachers, school boards, and school administrators. Because of the number of professionals who must attend meetings and because of the need to schedule meetings when parents can attend, most IEP meetings are held before or after regular school hours. In addition, preparation for and paperwork following an IEP meeting take time. Teachers complain that the number of hours they must work has increased considerably without a requisite increase in salary and that their collective bargaining agreements with school boards are being violated.

Some experts on the education of the handicapped contend that the paperwork requirements are no greater now for conscientious teachers than they were prior to the current regulations. HEW addressed this issue in its comments to the final Public Law No. 94-142 regulations, noting that the problem must be worked out between teachers and school boards in compliance with the provisions set forth in the federal law.[32] For the advocate representing students and parents, this issue and its ramifications could be dealt with in several ways, including a request for student and parental participation in collective bargaining between teachers and the school board. In any event, sensitivity to the pressures on educators resulting from the IEP requirement would be helpful.

Opposition to teacher involvement in IEP meetings and concern about teacher workload and rate of pay can become so intense that some school districts have tried to hold IEP meetings at which representatives of the teachers' union were present for the specific purpose of protecting the interests of the teachers participating in the IEP meeting. There are two arguments against union participation in IEP meetings. First, since union representatives usually attend to protect the interests of the teacher, they are not at the meeting to serve the needs of the student and, in fact, may be working against the student. The legislative history of Public Law No. 94-142 indicates that participation in IEP meetings should be limited to those with a strong interest in the student;[33] teacher union representatives do not meet this criterion.[34]

Second, under protections afforded in the Buckley Amendment,[35] teacher union participation in the IEP meeting would be barred. The Buckley Amendment limits access to student record information to those having direct involvement in the education of a student unless the family has provided prior written consent to the disclosure of the information to other individuals. Because student records information protected by the Buckley Amendment would be discussed in an IEP meeting, participants should be limited to those having a direct interest in the student, unless the family has given written prior consent to the participation of others,[36] such as teacher union representatives.

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[29] 20 U.S.C. § 1401(19); 34 C.F.R. § 300.344(b)(1)(2).

[30] When the evaluation concerns the existence of a specific learning disability, special procedures are to be followed. *See* 34 C.F.R. § 300.540-.543.

[31] *See* 34 C.F.R. § 300.344, Comment.

[32] *See* 34 C.F.R. § 300.344, Comment.

[33] *See* 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[34] *See* sources cited note 33 *supra*.

[35] 28 U.S.C. § 1232g.

The local school will usually have the authority to select which specific staff member it wishes to designate as the agency representative at the IEP meeting.[37] The agency representative selected should, however, be someone who has both the authority to ensure that the programs and services described in the IEP will actually be provided and the power to commit agency resources to the education of the student.[38] The agency must allow whoever it sends to the IEP meeting the discretion to make a binding commitment to the IEP from the school without requiring approval of the IEP team decision by higher levels within the school administration.

The agency representative at an IEP meeting may vary considerably depending upon the nature of a student's needs. For a student requiring expensive services, the agency representative might need to be a high-ranking administrator who has the power to commit substantial agency resources at the IEP team meeting.[39] For other students with less complicated needs, however, the agency representative might be a special education supervisor or coordinator or even a teacher, although the teacher serving as agency representative could not be the same person as the team member serving as the student's teacher.

In some situations, there may be no special education staff at the student's school. This could be the case where, for example, the student attends a private elementary school but receives speech therapy services from the local school district. In this case, the agency representative should be a member of the staff of the school district providing the special service.[40]

Parental participation, or the participation of a representative of the parent, is crucial for the success of the IEP meeting. Such parental participation ensures that a wider range of information about a student's strengths and weaknesses, particularly out of school, will be available for decisionmaking. It also fosters active involvement of the family in working on the student's problems. Most special education programs and services are more effective if the family reinforces at home what is being taught at school. Finally, parental participation is a primary means of ensuring that students are not misclassified, for example, as retarded when their true abilities, particularly as indicated in their behavior outside school, are greater.

Commentators who have studied the importance of parental participation in both the evaluative and IEP-writing processes have noted:

> Parental involvement in the assessment process has been shown to have immediate benefit to special educators. For instance, it has become apparent that the parents of children in need of intensive assessment may be enlisted in becoming valuable sources of diagnostic information, especially with regard to the child's peer and family interactions, health and play habits, developmental history and medical history. Moreover, parents who become actively involved in the assessment process often are willing to assist in actual program implementation, thereby providing a sense of continuity between home and school. Finally, parental involvement in assessment and programming adds a new dimension to the concept of accountability in educators — the direct accountability of educators to the parents whose children they shape. In the context of culturally appropriate assessment, this accountability to parents is particularly meaningful since it implies accountability to the child's cultural and linguistic heritage as well.[41]

The same benefits accrue as a result of the due process protections:

> Assuming that greater parental participation in the decisionmaking apparatus is associated with increased fulfillment of due process guarantees, what are some of the gains and losses that can be anticipated? On the positive side, parents may not reject school placement decisions as often, thereby reducing the number of due process hearings (Kirp and Kirp, 1976). Also, parents may become more receptive and less hostile to the school's demands, especially when they are involved in placing students in special classes. Finally, parents may be taught methods for dealing with the child in the home, thus fulfilling the "home-school" team effort so often advocated. This team relationship may become necessary as parents are required to be present during the development of the individualized education plan as proposed in 94-142. However, there may be certain disadvantages that accompany parental involvement. Greater participation may also mean more opportunities for parents to observe the system, and they may conclude that schools are not operating in the best interest of their child. More im-

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[36] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[37] *See* sources cited note 36 *supra*.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] A. CARROLL, G. GUIRSKY, K. HINSDALE, & K. MCINTYRE, CULTURALLY APPROPRIATE ASSESSMENT: A SOURCEBOOK FOR PRACTITIONERS (1977) (*quoted in* EXPLORING ISSUES IN THE IMPLEMENTATION OF P.L. 94-142: PET 23 (Research for Better Schools, Inc., ed. 1979)).

> portantly, the presence of parents may require major changes in the committee's handling of the case, which may affect the degree of openness with which members state opinions and suggest solutions.[42]

The regulations under Public Law No. 94-142 set forth procedures to be followed by schools to insure parental participation in the IEP meeting.[43] Notice of an IEP meeting describing the purpose, time, location, and participants must be provided to the parents sufficiently in advance so that they can attend the meeting. The time and place scheduled for the IEP meeting must be mutually agreed upon, although most meetings are held at the school. If needed, a meeting must be rescheduled or relocated for the parent's convenience.

If a parent is unable to attend an IEP meeting or cannot be located, the school is required to take certain additional steps. A meeting can be conducted without the presence of the parents only if the school tried to convince the parent to come but was unable to do so.[44] If the parents do not participate, the school must be able to produce records showing that it tried to set up a meeting at a mutually agreed time and place. These records could include a log of phone calls made, copies of correspondence, or detailed records of visits made to the parents' home. If the parent cannot attend the meeting, the school must provide an alternate means of parental participation, such as telephone discussion.[45] One factor which a school or advocate may consider if parental participation is impossible is whether a surrogate parent can be appointed for the student.[46]

The participation of the student in the IEP meeting is required where such participation is appropriate.[47] The notion of including a student in a meeting to discuss that student startles many educators. The usual response to such a proposal is that it is never appropriate because to discuss the student's weaknesses in front of him/her would be emotionally damaging and demoralizing. Experience, however, indicates that the inclusion of students, particularly older ones, is generally beneficial. First, students can offer useful information to the team. For example, students can suggest why they acted in certain ways. One young student being considered for placement in a class for the educable mentally retarded, when asked by team members why he was behind in his studies, said he could not see the blackboard; the student was then given an eye exam which indicated that he had a visual rather than an intellectual problem. A student participant can also benefit from the meeting by knowing that people, both at home and at school, care about his/her needs.

Increased self-understanding can also result from the student's attendance at the meeting. One 16-year-old girl, who was having increasing difficulty in school but had never been in special education classes, suffered from an unusual form of specific learning disability. Issues surrounding her education, evaluation, and disciplinary problems became so controversial that her case culminated in litigation. Finally, an IEP meeting was held and, despite protests from the school, the girl attended. Following the meeting, she reported great relief at learning she was not, as she had come to believe during the controversy, being evaluated because everyone thought she was "crazy." Once the girl was placed in an appropriate program, her attitude toward school improved considerably, in part because she had become involved in the planning of her own education.

The provision allowing for other individuals to attend the IEP meeting will probably not be liberally construed. Legislative history indicates that the meetings should be small. Senator Randolph stated: "it was the intent . . . that these meetings . . . be small meetings; that is, confined to those persons who have naturally an intense interest in a particular child. . . ."[48]

To maximize the efficiency and the benefit to those directly concerned with the child's education, the IEP meetings should be kept small, allowing for additional participants only when they are essential.

The number of people who can participate in an IEP meeting is not specified by either statute or regulation. On the average, probably less than half a dozen persons attend.[49] The United States Department of Education's policy interpretation on IEPs indicates that the meetings should be small since such meetings allow for more open, active parent involvement. They are, moreover, less costly, easier to arrange and conduct, and usually more productive.[50] The Department concedes, however, that there may be situations in which more participation may be useful.[51] The Department's policy interpretation also indicates that a student's regular teachers would not routinely attend IEP meetings but should be informed about the student's IEP by the special teacher or an agency representative and/or should receive a copy of the IEP itself.[52]

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[42] Yoshida & Gottlieb, *A Model of Parental Participation in the Pupil Planning Process*, 15 MENTAL RETARDATION 17 (1977) (*quoted in* EXPLORING ISSUES IN THE IMPLEMENTATION OF P.L. 94-142: PET 30 (Research for Better Schools, Inc., ed. 1979)).

[43] 34 C.F.R. § 300.345.

[44] *Id.* § 300.345(d).

[45] *Id.* § 300.345(c).

[46] *See* § 4.3 *infra*.

[47] 20 U.S.C. § 1401(19); 34 C.F.R. § 300.344(a)(4). *See also* 46 Fed. Reg. 5467 (1981):

> Generally, a handicapped child should attend the IEP meeting whenever the parent decides that it is appropriate for the child to do so. Whenever possible, the agency and parents should discuss the appropriateness of the child's participation before a decision is made, in order to help the parents determine whether or not the child's attendance will be (1) helpful in developing the IEP and/or (2) directly beneficial to the child. The agency should inform the parents before each IEP meeting — as part of the "notice of meeting" required under § 300.345(b) — that they may invite their child to participate.
>
> Note. The parents and agency should encourage older handicapped children (particularly those at the secondary school level) to participate in their IEP meetings.

The Reagan administration has published a notice of intent to review and possibly revise this policy interpretation. 46 Fed. Reg. 19,000 (1981).

[48] 121 CONG. REC. S10,974 (daily ed. June 18, 1975).

[49] 46 Fed. Reg. 5466 (1981); 46 Fed. Reg. 19,000 (1981).

[50] *See* sources cited note 49 *supra*.

Although the federal policy interpretation encourages limitations in the size of the meetings, some problems may result from the approach. In many cases, the participation of all educators involved with a student may be the only effective means of ensuring that everyone is familiar with the student's needs and the recommended approach for dealing with them. For example, Sharon, a seriously emotionally disturbed student who is placed in a resource room for part of the school day and is integrated into the regular school program for the remainder of the day, needs special treatment whenever she engages in misbehavior. The discipline she needs requires some detailed intervention from teachers. Unless all the teachers who work with Sharon are fully instructed in the disciplinary stategies, Sharon's problems may be intensified. In this situation, as in many others, it would be extremely beneficial to have many individuals present for at least that part of the IEP meeting during which disciplinary issues are discussed and strategies for dealing with discipline problems are formulated.

The federal policy interpretation also suggests that providing the student's regular teacher with a description of the IEP may suffice. If the student is to maintain his/her involvement with the regular class teacher, or if the teacher has any information about the student which is useful, it is probably advisable in most cases to involve that teacher in the meeting.

4.2.3 IEP TIMELINES

Under Public Law No. 94-142 regulations, an IEP must be in effect before special education and related services are provided a student.[53] For an IEP to be "in effect," it must have been developed at an IEP meeting that met the procedural and participation requirements for such meetings. Also, the IEP must contain all of the required written components and must be implemented accurately.[54] In most instances, the IEP should be being implemented in full to be in effect. However, one requirement of the IEP document is statements of the date services will be initiated, and IEP team members may have agreed that certain components of the IEP may start at a later date.[55] With that one exception, an IEP is to be in effect "as soon as possible" after the IEP team meeting.

A federal policy interpretation has indicated that there should be no time lag between when a written IEP is finalized and when it is implemented for a student.[56] The interpretation is more specific as to the timeliness for when the meeting must be held to write the IEP. For a handicapped student who is to begin receiving special education for the first time, those special programs and services cannot begin until after an IEP has been properly developed and signed by the family.[57] It would be appropriate, however, if the family desires a program or service to begin sooner to enter into a written agreement for an interim IEP and placement for the short period until a proper IEP can be developed. For the student who will be new to special education, this time gap between completion of evaluation and completion of the IEP can, according to regulation, last no longer than 30 days.[58]

For all students who have been receiving programs and services under an IEP, the IEP must be reviewed at least annually,[59] more often if there is a request or need for review. However, the review and revision process must be conducted in a way that ensures that the written IEP will be in effect for each handicapped student at the beginning of each school year. IEP review meetings can be held at any time as long as there is an IEP in effect at the start of school.[60] Districts hold the meetings at the end of the school year, during the summer, or on the anniversary date of the last IEP meeting for a student.

4.2.4 WRITING THE IEP: GOALS, OBJECTIVES, AND OUTCOMES

While the regulations under Public Law No. 94-142 clearly indicate that the IEP is not enforceable as a contract,[61] a parent or advocate participating in the drafting of an IEP should regard its terms with the same care as (s)he would a contract for the sale of goods or real property. While it may not be possible to hold a school or educator accountable for a student's failure to achieve the growth projected in an IEP,[62] it is possible to hold a school district accountable for failure to provide the appropriate programs listed in a student's IEP.[63] Because the IEP contains the definitions of what are appropriate educational programs and services for a particular student,[64] each program and service needed by the student should be listed in the IEP. Failure by the school to provide any element set forth in the IEP constitutes a denial of appropriate education and an abrogation of federal statutory rights.[65] Such failure can be contested through the complaint mechanism for administrative review[66] or is actionable in either federal or state court.[67]

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[51] *Id.* For example, the federal policy interpretation indicates that related services personnel are not required to attend an IEP meeting, but

> if a handicapped child has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. For example, when the child's evaluation indicates the need for a specific, related service (e.g., physical therapy, occupational therapy, or counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child.

46 Fed. Reg. 5467 (1981). The Reagan administration has published a notice of intent to review and possibly revise this policy intepretation. 46 Fed. Reg. 19,000 (1981).

[52] *See* sources cited note 49 *supra*.

[53] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[54] *See* sources cited note 53 *supra*.

[55] 20 U.S.C. § 1401(19).

[56] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[57] *See* sources cited note 56 *supra*; 20 U.S.C. § 1414(a)(5); 34 C.F.R. § 300.342.

[58] 20 U.S.C. § 1414(a)(5); 34 C.F.R. § 300.343(c).

[59] 20 U.S.C. § 1414(a)(5); 34 C.F.R. § 300.343(d).

[60] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[61] 34 C.F.R. § 300.349.

[62] *Id.*

[63] 20 U.S.C. § 1401(18); 34 C.F.R. § 300.4.

[64] *See* authorities cited note 63 *supra*.

The IEP is also a document that a parent or advocate can use as a "road map" for monitoring a student's educational progress. The IEP should have sufficient detail so that it can be compared, on a regular basis, to what is reported about the student's actual performance and achievement.

4.2.4.1 IEP Contents

The written individualized education program (IEP) must contain statements of the following:

- The student's present levels of educational achievement;
- Annual goals for the student;
- Short-term instructional objectives to be reached in working toward each of the annual goals;
- The schedule, criteria, and procedures for evaluation to determine whether each instructional objective is being achieved;
- The specific educational and related services to be provided the student;
- The extent to which the student will participate in the regular educational program or in the least restrictive environment (LRE);
- The projected date services to the student will begin;
- The anticipated duration of services to the student.[68]

The single most important criterion in writing or reviewing an IEP is the extent to which the document is tailored to meet the student's individual needs. The programs and services developed for the student must be appropriate given the information about the student obtained during the student's evaluation. The statement of "present levels of educational performance"[69] must, therefore, accurately describe the effect of the student's handicap on the student's performance in any area of schooling that is affected, either academic or nonacademic. The information must be specific and detailed; statements of present levels of performance which rely upon such labels as "mentally retarded" or "deaf" as substitutes for detailed descriptions of actual levels of performance are not acceptable.[70]

Statements of present levels of education performance of a student should be written in objective, measurable terms to the extent possible. Most of this information will be taken from the evaluation report, such as test scores coupled with explanations and interpretations of their meaning. The clearly expressed statements of the present levels of performance for a student should be directly related to the goals and services to be provided to the student.[71] If, for example, evaluation information indicates that a student has problems in reading, then those problems should be specifically included in the section of the IEP setting forth the student's present levels of performance. In addition, the goals and objectives sections of the IEP should provide strategies for addressing the student's reading needs as defined in the levels of performance section, including programs and services designed to meet the student's reading needs.

Another relationship within the IEP document is very important. The "annual goals" in the IEP are to be statements describing what the student can reasonably be expected to accomplish within a 12 month period. These goals, again, should be defined on the basis of an understanding of the present levels of the student's needs. Once the annual goals for the student have been specified, then the "short-term instructional objectives," or "IEP objectives," as they are sometimes called, must be developed. The short-term objectives are to be measurable, intermediate steps between the student's present capabilities and the student's intended annual goals. In other words, progression through the objectives should allow the student to reach the goal. The objectives should be formulated by logically breaking down the annual goal into component parts. Once written, the objectives should provide a means of measuring whether a student is progressing toward the annual goal.[72]

Although not specified in the statute or regulations, there should be a direct relationship between a student's IEP goals and objectives and the contents of the teacher's instructional or lesson plans for the student. Ordinarily, however, the IEP is not detailed enough to stand alone as a teacher's plan for the student.[73] Rather than including in the IEP specific methods, activities, or materials to be used with the student, the teacher usually decides how to help the student reach his/her short-term objectives and annual goals. However, the family may wish to include even these issues in the written IEP if family members have concerns about how the student's day-to-day instruction will be carried out.

In any event, the short-term objectives in the IEP must be written by the IEP team prior to the student's placement into the special education program.[74] As noted above, teachers may develop instructional plans after the IEP is initiated, but the objectives for a student must be agreed to by the IEP team. Many schools try to postpone development of short-term objectives until after a program is started, but such a practice denies the family the right to participate in the formulation of the student's instructional objectives. Similarly, short-term instructional objectives cannot be revised by any process other than a meeting of the IEP team.[75]

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[65] *Id.*

[66] 20 U.S.C. § 1415(c); 34 C.F.R. § 300.509-.514.

[67] 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 300.511.

[68] 20 U.S.C. § 1401(19).

[69] *Id.*

[70] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[71] *See* sources cited note 70 *supra*.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

The IEP must also include a description of the programs and services to be provided the student. This must be a complete description of all the programs and services a student needs, not just those services which will be provided directly by the school. Thus, if the student needs to receive a service such as physical therapy from a local medical or social service agency, that service must be written into the IEP by the school, even if the school will not be providing the service.[76] The written IEP must describe all the services a student needs, regardless of their availability.[77] Further, the services described must include a definition of all special modifications which will be needed to allow a handicapped student to participate in the standard educational program.[78] If a hearing impaired student were to attend a regular art class but needed a special seating assignment, the modification should be written into the IEP.

The written IEP must specify the extent of the programs and services to be provided the handicapped student.[79] The family and other IEP team members should agree on the level of the school's commitment of resources to the student. The amount of time to be devoted to a program or service should be appropriate to the student's need for that service. Changes in the amount of service to be provided to a student must be agreed to by the IEP team. However, changes in scheduling the services should not usually require an IEP team meeting.

In some cases, the content of the IEP may be expanded to include elements of an individualized service plan developed under another federal program.[80] If the student is participating in a Medicaid or Social Security program, the student's IEP might be expanded to include, or be consolidated with, the elements of the individualized care plan required under Title XIX of the Social Security Act.[81] Also, the IEP may be consolidated with the individualized written habilitation plan required under the Developmental Disabilities Act.[82] Any time an IEP is consolidated with another program plan, the written document prepared must contain all of the required elements for each written plan.

4.2.4.2 Techniques for Writing IEPs

Because of its importance, the IEP must be written so that it is detailed, clear, concise, and specific. Educators, for the most part, have not developed great experience or training in writing IEPs. In fact, attorneys and advocates have an advantage when it comes to IEP-writing because of their training and experience, which emphasize precise language and careful drafting. However, there is a technique available to both educators and advocates. This technique, writing "behavioral objectives,"[83] is not widely used[84] but is extremely useful.

Instructional objective-writing techniques should be used in writing short-term IEP objectives and should be considered in the formulation of annual IEP goals. While there is no legislative history stating explicitly that Congress sought to mandate the use of Mager's objective-writing techniques in the IEP-writing process, the statutory definition of the elements of IEP does include the term "instructional objectives."[85]

Specifically defined instructional objectives are important in an IEP because they provide a basis for the selection, design, and implementation of the educational program. Carefully designed instructional objectives also establish standards for assessing the student's progress. An instructional objective:

- Describes an instructional outcome, goal, or result, rather than an instructional process or procedure. This may be an annual goal as required by 34 C.F.R. § 300.346(b).
- Communicates a specific instructional intent by stating: (1) what the learner is expected to be able to do; (2) what conditions (if any) under which the student performance is to occur; and (3) what level of performance the student must achieve to accomplish the objective.
- Includes a specific statement of the kind of performance that will indicate the student has mastered the objective. This performance must be measured in a directly observable or assessable manner. The measure used should always be the most direct measure possible.
- Describes a performance outcome by stating what the learner will be doing when demonstrating achievement of the objective.
- States the criterion for determining whether the student has achieved the objective.
- Is written in a manner which is open to the smallest possible number of interpretations other than the one intended. Therefore, objectives avoid ambiguous language in favor of specific language.

In writing IEPs, avoid terms such as to know, to understand, to really understand, to appreciate, to fully appreciate, to enjoy, and to believe. Instead, use terms like to write, to recite, to identify, to sort, to solve, to contract, and to compare.

For example, assume that an IEP is being written for a seriously emotionally disturbed first-grade student, Marie. Marie's evaluation indicates that she cannot attend recess without causing a fight, which includes biting, hair-pulling, kicking, or hitting. The IEP team determines that it wants Marie to learn to have better relationships with her peers at playtime and that her fighting must be stopped. An end to Marie's fights is thus the goal of this section of the IEP. The goal itself should be written in the format described above, *i.e.*, "Marie will not cause physical fights with her classmates at recess."

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] 42 U.S.C. § 1396a.

[82] 42 U.S.C. § 6011.

[83] R. MAGER, PREPARING INSTRUCTIONAL OBJECTIVES (2d ed. 1975). The following discussion relies heavily on Mager.

[84] Klein, Tye, & Wright, *A Study of Schooling: Curriculum*, 61 PHI DELTA KAPPAN 247-48 (1979).

[85] 20 U.S.C. § 1401(19).

Next, the short-term objectives designed to help Marie reach her goal should be specified in the format described. In writing these short-term objectives, the particular techniques to be employed by the educators need not be stated since methodology usually falls within the expertise of educators. In more difficult situations, however, methodology, materials, textbooks, and the like may be specified in the IEP. The short-term objectives for Marie might be:

- "Marie will use verbal discussion rather than physical action in expressing her disagreement or anger with her classmates at recess."
- "Marie will identify situations on the playground in which her interests and those of her classmates conflict."
- "Marie will identify her interests in a conflict and will identify the interests of the classmates with whom she is in conflict."
- "Marie will identify and implement compromises to eliminate disagreements with her classmates."[86]

Short-term instructional objectives are the building blocks for achieving annual goals. Most short-term instructional objectives are sequential in nature, proceeding step by step toward the goal. Each objective and each goal should be directly linked to every other element of the IEP, *i.e.*, to the information underlying the goal or objective, the services needed, the personnel responsible for providing the services, the date the services will begin, the anticipated length of time to reach the goal, and the criteria, procedures, and timeliness for determining if goals and objectives are being met.[87]

The IEP is also designed to monitor a student's progress. This is reflected in the regulations' requirement for periodic review of the IEP. Senator Randolph explained this dual function of the IEP plan and meeting process, stating: "By monitoring a child's progress a teacher can aid the child in achieving educational goals as well as determining where a potential problem will arise."[88] The follow-up of the effectiveness of the program is thus an important as the actual IEP. Senator Randolph noted the "vital" nature of periodic IEP review.[89]

If monitoring is not performed, a problem could arise which could take an inordinate amount of time to correct. The handicapped child requires a special type of evaluation to ensure progress. According to Senator Stafford:

> [The IEP] is extremely important if the child's progress is to be adequately monitored and if appropriate steps are to be taken to assure that the problems with the educational process that the child is having are met in a timely and consistent way.[90]

The frequency of monitoring can vary. While legislative intent, but not the statute itself, indicates that two planning conferences were to be held in the first year, Congress did not mean that more frequent review, when needed, was to be precluded. Senator Robert Dole stated: "I can see the need for individualized conferences, and in some instances perhaps, there ought to be 10 a year, or more. In the cases of other handicapped children as defined by this act, perhaps 1 a year would be sufficient."[91]

The regulations incorporate this intent by providing: "A meeting must be held for this purpose [review and, if necessary, revision] *at least* once a year."[92] The annual review is a minimum; more frequent reviews should be held if appropriate.[93] There is a basic requirement that an IEP be in effect at the beginning of each school year, but this does not mean that the annual review must take place at the beginning of each school year.

4.2.5 PROCEDURAL PROTECTIONS IN WRITING IEPs

The primary protections for the family during the IEP development process are those described above, specifying who will be on the IEP team, requirements for and a definition of parental participation, and components of the IEP.[94] To further ensure family understanding of and participation in the student's program, the school is required to furnish a copy of the IEP to the parents.[95] It is important that the family keep this copy and use it regularly to monitor the student's progress through the program.

A parent may be asked to sign an IEP as evidence of approval of the IEP and of the parent's consent. In some schools, a parent's signature on the IEP is required as proof of consent to special education if the student is being placed in special education for the first time.[96] Such written consent is required prior to initial placement of a handicapped student.[97] There are numerous reports of school personnel threatening or intimidating parents who refuse to sign IEPs. Sometimes, school personnel threaten dire consequences if the document is not signed. A parent, however, cannot be required to sign an IEP. If the parent is concerned that services may not be provided if the IEP is not signed, but the IEP does not seem appropriate, the document may be signed under protest.[98] In such a case, parents should write on the IEP that they approve the IEP except for certain specified reasons briefly noted either on the IEP or in a separate document signed by the parent, with a copy attached to the IEP.

Once an IEP has been signed or accepted by the parent, the parent still retains the right to complain about the appropriateness of the IEP. A review or revision of an IEP can be sought by a parent at any time, even immediately after the document has been approved.[99] This review or revision can be sought by requesting it from the school informally, by seeking a new evaluation, which should trigger an IEP meeting, or by filing a complaint about the appropriateness of the student's program and seeking an administrative hearing.

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[86] An example of how the part of Marie's IEP dealing with her playground problems might look appears as Appendix 4A *infra*.

[87] 34 C.F.R. § 300.346.

[88] Senate Floor Debate on S. Rep. No. 94-455, 121 CONG. REC. S37,410 (daily ed. Nov. 19, 1975).

[89] *Id.* at S20,427.

[90] Senate Floor Debate on S.6, 121 CONG. REC. S10,955 (daily ed. June 18, 1975).

[91] *Id.* at S10,983.

[92] 34 C.F.R. § 300.343 (emphasis added).

[93] *See* 46 Fed. Reg. at 5465. However, the Reagan administration has published a notice of intent to review and possibly revise this policy interpretation. 46 Fed. Reg. 19,000 (1981).

[94] *See* §§ 4.2.1-4.2.4.1.

[95] 34 C.F.R. § 300.345(f).

[96] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[97] 34 C.F.R. § 300.504(b).

[98] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

The student is also entitled to an automatic annual review of the IEP. This usually means that the annual review of an IEP is conducted at the end of the school year to determine the program for the coming year, during the summer before the school year begins, or on the anniversary date of the last IEP meeting for the student.[100]

4.2.6 MONITORING THE IEP

While the IEP does not have to contain a separate section setting forth evaluation criteria and schedules, methods and timelines for evaluating the student's progress through his/her educational program must be incorporated in the IEP.[101] With this framework for evaluation of educational progress set forth at the beginning of the student's program, progress can, and should, be measured on a regular basis by both the school and the family.

The goals and objectives set forth in the IEP should provide helpful guidance, in a general way, for knowing what should be offered to the student by the school. Most IEPs will not contain detailed specifics about what the student's daily, weekly, or monthly instructional program will be; the IEP is only required to contain a provision for annual review. The family will need to obtain more specific and ongoing information about the student's progress. In addition to attempting to write meetings into the IEP, the family can also use several provisions in the Public Law No. 94-142 regulations to obtain review meetings with the school.[102] In addition to the annual IEP review meeting, as many IEP team meetings as the student needs may be held each year.[103] The family can request an IEP meeting at any time[104] as part of its attempt to monitor the progress of the IEP.

Because Public Law No. 94-142 is essentially a funding statute, certain criteria must be met before a school district is eligible to receive federal assistance to educate the handicapped. One of these qualifying requirements is the provision of an IEP for every handicapped child. Among the eligibility requirements, 20 U.S.C. § 1412(4) provides: "Each local educational agency in the state will maintain records of the individualized program for each handicapped child, and such program shall be established, reviewed and revised as provided in section 1414(a)(5)." In order to qualify for funding, section 1414(a)(5) provides that an application must be submitted containing:

> assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate, revise its provisions periodically, but not less than annually.

Finally, the regulations require: "The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children."[105]

Failure to meet these requirements may result in the termination of funding. Therefore, the IEP not only enhances the individualized attention so important in a handicapped child's education but also establishes a school's eligibility to receive federal funds.

Finally, Congress did not intend that the IEP be treated as a contract prepared by school officials for parents to accept or reject. Rather it is a plan which is the result of a cooperative effort of those directly concerned with the child's education. Senator Williams stated: "The [planning] conference is not a controversial relationship but rather a cooperative effort."[106] This cooperative approach also supports the plan's flexibility. Rep. Quie stated: "It is an educational plan developed jointly, but it is not intended as a binding contract by the schools, children, and parents."[107]

The plan which emerges from the planning conference should not bind the parties, allowing no room for changes. Problems in the child's adaptation to the program may arise or new information and developments may necessitate modifications. Whatever the situation, the IEP should always be adaptable, allowing those directly concerned with the child's education to review, revise, and add input. A cooperative, flexible effort can make the IEP a success.

4.3 SURROGATE PARENTS

To ensure adequate protections during the formulation of an IEP and in all other phases of the special education process, Public Law No. 94-142 gives students the right to obtain the appointment of a surrogate parent. A surrogate parent must be appointed whenever the parent or guardian of a student is unknown or unavailable or when the student is a ward of the state.[108] The surrogate parent assumes all of the rights and responsibilities of the natural or legal parent. All rights to notice, consent, evaluation, access to records, participation in IEP meetings, review, and appeal are afforded to a surrogate parent once (s)he has been appointed.[109]

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[99] *See* sources cited note 98 *supra*.

[100] *Id.*

[101] *Id.*

[102] 20 U.S.C. § 1401(10); 34 C.F.R. § 300.347, § 300.343; 20 U.S.C. § 1415(b)(2); 34 C.F.R. §§ 300.504-.512; 34 C.F.R. § 104.36.

[103] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[104] *See* sources cited note 103 *supra*.

[105] 34 C.F.R. § 300.344.

[106] Senate Floor Debate on S.6, 121 CONG. REC. S10,970 (daily ed. June 18, 1975).

[107] House Floor Debate on H.R. 7217, 121 CONG. REC. H7152 (daily ed. July 21, 1975).

[108] 20 U.S.C. § 1415(b)(1)(B); 34 C.F.R. § 300.514(a).

Unfortunately, determining when to appoint a surrogate parent is not an easy matter. Neither the statute nor the regulations provide effective guidelines on what is considered "unavailability" of the natural or legal parents.[110] The fact that a parent is unavailable because (s)he has been out of touch with the student might be grounds for the appointment of a surrogate parent in some situations. On the other hand, appointment of a surrogate might be inappropriate where no legal or natural parent or legal guardian is available but where someone, perhaps another family member, has been functioning as guardian.

A second difficulty with the surrogate parent provision is the frequent inconsistency between Public Law No. 94-142, which requires the surrogate to perform certain functions and state laws concerning guardianships, child custody, and the like. Provisions for the appointment of such individuals are lacking in most state laws, as are provisions for a surrogate parent to have legal authority to make decisions, give consent, and perform the other functions of a surrogate.

The language in Public Law No. 94-142 assumes that a surrogate parent would function in the best interests of a student, just as a natural or legal parent would. Therefore, there are some minimal qualifications concerning the ability of an individual to function as a surrogate. A surrogate parent may not have any interest which conflicts with that of the student and must have knowledge and skills that ensure adequate representation of the student.[111] In addition, no surrogate may be an employee of a public agency charged with responsibility for or involved in the care of the child.[112] Public agencies may, however, compensate individuals for serving as surrogates as long as that is the sole extent of the relationship.[113]

The public agency responsible for the student has the duty of assigning a surrogate parent if the student needs one. The fact that the agency with which the student may have a conflict has the power to appoint the surrogate creates the possibility that the surrogate may not be a vigorous advocate for the student's interests. Some states and local educational agencies have trained groups of interested citizens who function independently, and quite successfully, as surrogate parents. In other locales, the surrogates have not exercised sufficient independence. Finally, some agencies have simply never used surrogate parents.

A concerned and effective surrogate parent is a very useful ally for an advocate who represents a handicapped student. While some advocates have attempted to have themselves appointed as surrogate parents for their clients, this is probably not wise in most situations. In a setting such as an IEP meeting, the student will benefit from having several voices speaking out in his/her behalf. Also, the advocate needs to have someone who can exercise independent judgment in determining what is best for the student.

4.4 FREE APPROPRIATE EDUCATION

The right to receive a free[114] and appropriate public education and not to be excluded from schooling on the basis of handicap is embodied in both Public Law No. 94-142 and Section 504 of the Rehabilitation Act of 1973, and their implementing regulations. As a condition of receiving federal funds under Public Law No. 94-142, states must have adopted and implemented a policy ensuring a free, appropriate public education for all handicapped children[115] between the ages of 3 and 18 by September 1, 1978, and for those between 3 and 21 years of age by September 1, 1980.[116]

Section 504 of the Rehabilitation Act of 1973 forbids discrimination against "otherwise qualified" handicapped students. For purposes of elementary and secondary school education, the regulations provide that a handicapped student is "otherwise qualified," and thus protected under the Act, if the student is:

- Of an age during which nonhandicapped persons are provided such services;
- Of an age during which it is mandatory under state law to provide such services to handicapped persons; or
- To whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act.[117]

The Section 504 regulations also provide as follows: "A recipient that operates a public elementary or secondary education program shall provide a free[118] appropriate education program to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or the severity of the person's handicap."[119]

An "appropriate education" is defined pursuant to Public Law No. 94-142 as "special education and related services," including preschool, elementary or secondary school education, provided in conformity with the required individualized education program.[120] "Special education" is defined as "specifically designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."[121] Accordingly, it is apparent from the language of Public Law No. 94-142 that an appropriate education is an education tailored to meet the unique needs of each handicapped child and is to be achieved primarily through the development and implementation of an individualized education program (IEP).[122]

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[109] 46 Fed. Reg. 5468 (1981). However, the Reagan Administration has published a notice of intent to review and possibly revise this policy interpretation. 46 Fed. Reg. 19,000 (1981).

[110] *See* sources cited note 109 *supra*.

[111] 34 C.F.R. § 300.514(c).

[112] *Id.* § 300.514(d)(1).

[113] *Id.* § 300.514(d)(2).

[114] *See* 34 C.F.R. § 300.4a (definition of "free" under Pub. L. No. 94-142). *See also* § 4.8 *infra*.

[115] 20 U.S.C. § 1412 (1), (2)(B); 34 C.F.R. § 300.121.

[116] 20 U.S.C. § 1412(a)(B); 34 C.F.R. §§ 300.122-.126.

[117] 34 C.F.R. § 104.33(b)(2). Section 612 of Pub. L. No. 94-142 is codified at 20 U.S.C. § 1412.

[118] *See id.* § 104.33(c) (definition of "free" under § 504).

[119] *Id.* § 104.33(a).

[120] 20 U.S.C. § 1401(18); 34 C.F.R. § 300.4.

[121] 34 C.F.R. § 300.14.

A more specific definition of appropriate education is not provided by either the two federal statutes or the relevant regulations. Left unresolved are the exact standards for defining the appropriate educational program for a handicapped student. There are three possible standards for measuring the appropriateness of a handicapped student's IEP. An educational program could be designed:

- To meet the needs of a handicapped student as well as the needs of nonhandicapped students;[123]
- So that the student could, to the greatest extent possible, achieve self-sufficiency;
- To allow the handicapped student to reach his/her maximum potential in every respect.

Obviously, this last approach is the most attractive for the handicapped student, but it is the least likely to receive public or judicial approval because of the high costs of such an education. There is also the high probability that nonhandicapped students are not receiving such high levels of services.[124] The federal statutes mandating an appropriate education require more than a minimally adequate level of educational services for handicapped students in need of special education.

The results of the evaluation process should provide a number of clues to assist the advocate in developing an appropriate program to meet the individual needs of a handicapped student. For example, the advocate should have current indicators of the student's academic potential; information about the student's physical and emotional development; descriptive data concerning the child's socialization skills at school and at home, with peers and with adults; health data; educational history, including academic performance; and general information about academic, social, and cultural exposure at home and at school. In addition, an advocate who has been able to develop a relationship of trust with the student and his/her parent(s) should have a wealth of information from the family, which may or may not be known to the school system, to be used with discretion in developing the child's IEP.

In writing the IEP, the advocate must include the special education and related services which the school or other agencies are responsible for providing. The IEP must contain a statement of all services needed by the child, not merely those that are available within the system.[125] The student must then be provided with those services stated in the program. Under both Public Law No. 94-142 and Section 504 of the Rehabilitation Act, "each handicapped child must be provided all services necessary to meet his/her special education and related needs."[126]

Individualized education programs under Public Law No. 94-142 must also be formulated according to "least restrictive environment" principles.[127] This requirement attempts to ensure that students will be properly placed in programs where they will receive an appropriate education. Handicapped students have a right to participate in regular classroom and extracurricular activities with nonhandicapped students to the greatest extent practicable, while at the same time being provided special education and related services.[128] This right applies to the full range of academic program options, nonacademic services, extracurricular activities, and physical education.[129]

The regulations resulting from Section 504 of the Rehabilitation Act of 1973 use a comparability standard to define an appropriate education for handicapped students. Section 84.33(b) of the regulations reads as follows:

> an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based on adherence to procedures that satisfy the requirements of [the regulations].

The Department of Health, Education and Welfare's comment to this regulation explains that "[t]o be appropriate, [educational] services must be designed to meet handicapped children's educational needs to the same extent that those of nonhandicapped students are met;" and that the "quality of educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped students' teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. . . ."[130]

By delineating prohibited types of discriminatory actions, the section 504 regulations further elucidate the meaning of an appropriate educational program:

> (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap: (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service; . . . (vii) Other-

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[122] 20 U.S.C. § 1401(19). *See also* 34 C.F.R. § 300.346; *B.E.H. Final Policy on IEPs*, 2 EDUC. OF THE HANDICAPPED L. REP. 203:13; § 4.2 *supra*.

[123] This comparability standard is probably the most reasonable approach under § 504, which merely prohibits discrimination on the basis of handicapping conditions. *See* 34 C.F.R. § 104.34(c).

[124] It may be useful to review the terms of applicable state statute(s) and the state constitution to determine the level of educational services contemplated for both handicapped and nonhandicapped students. Some state constitutions, for example, guarantee all students the right to a "thorough and efficient" or "sufficient" or "minimally adequate" education. *See also* § 1.3 *supra* (discussion of a constitutional right to education for the handicapped).

[125] *See also* 34 C.F.R. § 300.349 (obligation to provide all services listed in the IEP); § 4.2 *supra*.

[126] 20 U.S.C. § 1415(b)(1)(A); 34 C.F.R. § 300.4; 34 C.F.R. § 104.33.

[127] 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. §§ 300.132, 300.227, 300.550-.556.

[128] 20 U.S.C. § 1412(5).

[129] 34 C.F.R. §§ 300.305-.307.

[130] 42 Fed. Reg. 42,676, 42,690-91 (1977).

> wise limit a qualified handicapped person in the employment of any right, privilege, advantage or opportunity enjoyed by others receiving an aid, benefit, or service. . . .
>
> (4) A recipient may not . . . utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap; (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons; or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.[131]

This same section of the regulations provides that it is illegal for recipients of federal financial assistance to fail to provide handicapped persons with benefits or services that are less effective than those provided to others and explains equal effectiveness as follows:

> (2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.[132]

The use of the term "equally effective" in the above regulation indicates clearly that modifications of existing regular programs or creation of different programs may be necessary to ensure that the needs of handicapped persons are met to the same degree that analogous needs of the nonhandicapped are met.

Rights similar to those established under Public Law No. 94-142 are found in the Section 504 regulations enabling handicapped students to participate in the full range of academic programs, nonacademic services, extracurricular activities, and physical education.[133] For instance, handicapped persons shall be educated with nonhandicapped persons "to the maximum extent appropriate" and shall be placed in the regular education program "unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."[134] Under both the Section 504 regulations and Public Law No. 94-142, such placement must be based on a fully individualized evaluation[135] so that students are not placed in programs unsuited to their needs.[136] Moreover, each recipient operating an elementary or secondary education program is required to establish and implement a system of procedural due process safeguards[137] to ensure the correct indentification, evaluation, and educational placement of individuals who have or are believed to have special needs.

As evidenced by these provisions concerning appropriate education, Section 504 not only requires comparability between handicapped and nonhandicapped students but, as does Public Law No. 94-142, relies on due process protections to facilitate that goal.

4.5 RIGHT TO EXTENDED YEAR PROGRAMS

A major dispute between public officials and advocates for the handicapped concerns whether the federal statutes on the education of the handicapped require that educational agencies provide year-round programs for handicapped students for whom such programs would be appropriate. Most often, these students are severely or profoundly impaired persons, sometimes institutionalized and often with extensive needs for related services. Many of these students are placed in residential institutions.

Students who might contend that full-year educational programs are necessary to provide them with an appropriate education include those who substantially regress whenever their educational programs are interrupted for a long period of time, as during the summer months. An analysis of whether a year-round school program might be necessary for a particular student depends upon an analysis of that student's individual needs. Whether a year-round educational program is mandated under federal law is a separate problem.[138] Both federal statutes and both sets of implementing regulations are silent on the issue.

In all states, state law defines an ordinary or usual school year for students. In most states, the length of the regular school year is 180 school days, or a total of about eight months. State or local educational officials in many jurisdictions have argued that the federal mandate for appropriate education for the handicapped cannot be construed to require the provision of programs and services beyond the time for the usual school year. This interpretation would bar the delivery of appropriate education to those students whose individual needs are such that year-round schooling is needed to prevent significant losses of educational development.

Public Law No. 94-142, its implementing regulations,[139] and the regulations promulgated under Section 504 of the Rehabilitation Act[140] guarantee the right to an appropriate education to handicapped students. The claim under Public Law No. 94-142 and its implementing regulations is unambiguous and should be successful for the handicapped student.[141] However, the Section 504 regulations, although clear in their articulation of the right to an appropriate education, also contain some separate language which may be somewhat contradictory. Specifically, the general nondiscrimination provisions of the Section 504 regulations indicate that the programs and services called for "are not required to produce the identical result or level of achievement for handicapped and non-handicapped persons, but must afford handicapped persons equal opportunity to obtain the same benefit, or to reach the same level of achievement. . . ."[142] If this is construed as a "comparability" standard, then perhaps offering a handicapped student 180 days of schooling each year might be sufficient. Such an approach, however, conflicts with earlier definitions of appropriateness and equality of opportunity. If the family feels that year-round education is appropriate for a student, such a program should be written into the IEP.

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[131] 34 C.F.R. § 104.4(b).

[132] *Id.*

[133] 34 C.F.R. §§ 104.34, 104.37. *See also* H.E.W. Policy Interpretation No. 5, 43 Fed. Reg. 36,034 (1978).

[134] 34 C.F.R. § 104.34(a).

[135] *Id.* § 104.33.

[136] *Id.* § 104.35(b)(c).

[137] *Id.* § 104.36.

[138] *See* App. A, § 140.c *infra* (case summaries).

[139] 20 U.S.C. §§ 1401(18), 1415(b)(1)(A); 34 C.F.R. §§ 300.4, 300.300-.307. *See also* § 4.4 *supra*.

[140] 34 C.F.R. § 104.33. *See also* § 4.4 *supra*.

4.6 EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT

The right of handicapped students to education in the least restrictive educational environment (LRE) is required by both Public Law No. 94-142 and Section 504 and their implementing regulations.[143] There are several purposes for the LRE requirement, including the goal of diminishing stigmatization of the handicapped by nonhandicapped students through increased familiarity and understanding. Integration of the handicapped provides disabled students the opportunity to learn the social skills needed to function in an integrated society.[144] Finally, integration ensures that handicapped students will not be relegated to inferior facilities and services as they have been in the past.

The LRE concept has been proposed by educators for many years in conjunction with the "cascade of services" or "continuum of services" model for the delivery of special education programs and services.[144a] This model served as the basis for some of the expert testimony later incorporated into the provisions of the consent agreement in *PARC*.[145] The cascade of services model describes the hierarchy of services available to handicapped students, ranking programs in descending order of restrictiveness. The presumption of this model is that most students can be accommodated in the higher, less restrictive programs and that few students will need to be moved down the continuum to more restrictive placements. Many general types of programs are identified:

- Full-time regular placement with special outside consultation being provided to the regular class teacher so that (s)he can work with the child in the regular classroom;
- Regular class placement with supplementary teaching, tutoring, or treatment being provided to the child either in the regular classroom or elsewhere (e.g., in the office of a speech clinician);
- Regular class placement and assignment for several periods per day in a "resource room" run by special education teacher for children with one or more types of handicap;
- Placement part-time in a regular classroom and part-time in a special education classroom;
- Full-time placement in a special day school for the handicapped;
- Placement in a hospital school;
- Placement in a hospital or treatment center; or
- Placement at home with services provided by a visiting tutor.[146]

One warning about the "cascade of services" model and its applicability under the federal law is appropriate. The model describes as the most restrictive special education placements segregated institutional or home placements. However, the intent of both Public Law No. 94-142 and Section 504 is clearly to prohibit, for almost all purposes, segregated placements in special schools or institutions or the home; very few students truly need such placement. The legislative history of Public Law No. 94-142 indicates that

> while instruction may take place in such locations as classrooms, the child's home, or hospitals and institutions, the delivery of such instruction must take place in a manner consistent with the requirements of law which provide that to the maximum extent appropriate handicapped children must be educated with children who are not handicapped, and that handicapped children should be placed in special classes, separate schooling, or any other educational environment only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and supportive services cannot be achieved satisfactorily.[147]

The legislative history also states that the

> conferees specifically point out that serving children in State or regional centers must be done consistent with provisions of existing law which require that to the maximum extent appropriate, handi-

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[141] 20 U.S.C. § 1401(18); 34 C.F.R. § 300.4.

[142] 34 C.F.R. § 104.4(b)(2).

[143] 20 U.S.C. § 1412(5); 34 C.F.R. §§ 104.34, 300.550-.556.

[144] *See* Gilhool & Stutman, *Integration of Severely Handicapped Students: Toward Criteria for Implementing and Enforcing the Integration Imperative of P.L. 94-142 and Section 504*, EXPLORING ISSUES IN THE IMPLEMENTATION OF P.L. 94-142: IEP 191, 193 (RESEARCH FOR BETTER SCHOOLS, INC., ed. 1979).

[144a] *See* Figure 4.2.

[145] *See* Pennsylvania Ass'n of Retarded Citizens v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); Ch. 1 *supra*.

[146] *See* S. KIRK, EDUCATING EXCEPTIONAL CHILDREN 30-31 (1972) (describing a concept first set forth in Reynolds, *A Framework for Considering Some Issues in Special Education*, 7 EXCEPTIONAL CHILDREN 367-70 (1962)).

[147] S. CONF. REP. NO. 94-455, *reprinted in* [1975] U.S. CODE CONG. & AD NEWS 1480-81.

> capped children are educated with nonhandicapped children, and special classes, separate schooling, or other removal from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[148]

Therefore, any placement system that segregates students should be subject to close scrutiny and would probably be invalid.[149]

Some educators suggest that the "least restrictive environment" concept must be construed more strictly than the cascade of services model would suggest. These educators, particularly William Cruickshank, suggest that the LRE, according to the cascade of services model, may not always provide the appropriate learning environment for a handicapped child and that "the least" may often be the most restrictive.[150] Cruickshank suggests that this is particularly true in cases involving children with certain types of specific learning disabilities. Learning disabled children are often "borderline" cases and can be placed in one of the least restrictive settings: they can attend a regular class full-time or can spend most of their time in a regular class and the rest with a tutor or in a resource room. These children function best in learning situations where there are:

- Teachers trained to understand and work with learning disabled children;
- Appropriate learning materials and equipment;
- Appropriate curriculums; and
- Strong peer supports.

According to Cruickshank, a setting described as less restrictive under the cascade of services model might be very restrictive for a student with certain needs.

Cruickshank's comments suggest the importance of careful interpretation of the statutory requirement and the importance of balancing the various interests intended to be served by that requirement. The same provision that contains the LRE requirement also includes a mandate for "appropriate" placements. Each state recipient of federal aid is require to establish

> procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .[151]

The central issue, and one over which there will no doubt be considerable dispute, is the extent to which "mainstreaming," or integration of the handicapped into the regular educational program, is appropriate for each child. This is a highly individual determination. An understanding of the purposes of the mainstreaming or LRE concept should increase an advocate's effectiveness in this area.

The need for affirmative efforts to achieve placement in the LRE grew out of four major difficulties in the traditional practice of segregating the handicapped in special classes or institutions.

First there is the problem of stigmatization. The process of labeling certain individuals as handicapped and segregating them from the majority of students serves the socially convenient function of removing from public view those individuals with whom some find it difficult, uncomfortable, and sometimes embarrassing to deal. As a result, those who are educationally segregated are stigmatized because of their special class or special school placement. The segregation and stigmatization make it even more difficult for the majority of the population to deal with the handicapped due to lack of exposure to them, and the stigmatization thus becomes even greater.

Second, special class or special school placement has increased racial and cultural segregation in schools and in society. Through the referral and evaluation processes and the procedures used to place children in special education programs, a higher number of minority and low-income children are identified as handicapped than we would expect, given these groups' proportion of the general population.[152] Even when a factor is added to account for a higher percentage of handicaps among low income students due to nutritional and medical problems, there are unjustifiably higher percentages of minority and low-income children in special education programs than in the total school-aged population.

Third, studies have indicated that due to institutional inertia, once a child has been placed in a special education program, it is very rare for the child ever to leave that program and return to regular class placement.[153]

Finally, there have been many criticisms of the effectiveness of special education programs and services. One group of researchers has concluded:

> [S]tudies of the efficacy of special class placement suggest that the educable retarded child does at least as well academically if allowed to remain in the regular class. . . . [T]he humanitarian's plea that the retarded child's social and personal

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[148] S. CONF. REP. NO. 94-455 at 30, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1843.

[149] In addition to abridging the right to placement in the least restrictive environment, a system that tends to presume that certain types of students should be placed in isolated settings also abridges those students' rights to individualized programming. *See* § 4.2 *supra*.

[150] *See* Cruickshank, *Least Restrictive Placement: Administrative Wishful Thinking*, J. OF LEARNING DISABILITIES 5 (Apr. 1977).

[151] 20 U.S.C. § 1412(5)(B).

[152] Jane Mercer, in her study of mental retardation in Riverside, California, concluded that children from low status homes run twice the risk of being labeled mentally retarded as children from higher status homes. *See* J. MERCER, LABELING THE MENTALLY RETARDED 117 (1973).

[153] Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979).

> adjustment will be better if he is placed in a special class without frustrating pressure also has not been empirically validated.[154]

4.7 OUT-OF-DISTRICT PLACEMENTS IN PRIVATE SCHOOLS OR RESIDENTIAL FACILITIES

For those few students for whom the local school system cannot offer an appropriate program, placement in another school district, in a day program run by another public or private agency, or in a public or private residential facility may be appropriate. This placement outside the regular school system does not mean termination of the benefits of Public Law No. 94-142 or Section 504. Both statutes can apply to private schools. Public Law No. 94-142 applies to handicapped students who are placed in or referred to a private school or facility by a public agency when the placement is for the purpose of providing special education and related services.[155] Section 504 extends to all programs receiving or benefitting from federal financial assistance.[156] A private school could, therefore, be subject to Section 504 if the school receives federal aid directly or if it benefits indirectly from federal aid, as would be the case if it received tuition reimbursement for some of its students from federal sources, such as Social Security or Public Law No. 94-142 funds. As will be discussed below, in addition to Section 504 and Public Law No. 94-142, the protections of the Development Disabilities Act (D.D. Act) are particularly useful for the institutionalized handicapped.

It is important to note that the right to free education under Public Law No. 94-142 for students in private schools is limited to those students who have been placed directly in or referred to private facilities by a public agency. Students voluntarily placed in private facilities by their parents are not generally afforded the same benefits of oversight and monitoring by the state educational agency under Public Law No. 94-142.[157] However, if the reason the student's parents, rather than a public agency, placed the student in a private facility is that the public agency does not have or will not make available a free appropriate public education, then the student is entitled to the full protection of Public Law No. 94-142 because such placement might be termed "involuntary."

Students who have been or should be placed in private schools are subject to special provisions of the federal law concerning the education of the handicapped. The provisions affecting handicapped students in private schools, however, may differ depending upon the reasons for the placement and the manner in which the placement is made. Three sets of regulations are relevant: the implementing regulations under Public Law No. 94-142,[158] Section 504[158a] and the regulations under the General Education Provisions Act.[159] The latter regulations, referred to as the EDGAR regulations,[160] contain a variety of general administrative and substantive provisions about federal grant programs, including provisions governing participation of students enrolled in private schools in any federal grant program.[161]

Underlying all federal regulations concerning the education of handicapped children in private schools are two concerns: the constitutional requirement of separation of church and state and the provisions in Public Law No. 94-142 differentiating voluntary and involuntary private placements.[162]

The constitution requires a separation of church and state and limits governmental involvement in religious matters.[163] Thus, the EDGAR regulations set forth requirements limiting the participation of private schools in federal grant programs. The goal of these regulations is to foster compliance with the constitutional mandate against federal financial aid that could be used to further religious purposes. Under Public Law No. 94-142, a state educational agency is responsible for insuring that provision is made for the participation of private school handicapped students in special education programs and services.[164] Public Law No. 94-142 and its implementing regulations require the provision of programs and services to private school students to an "extent consistent with their number and location in the State."[165] This provision, coupled with a parallel EDGAR requirement[166] and an EDGAR provision requiring that states and local schools "provide students enrolled in private schools with a genuine opportunity for equitable participation" in all federally-funded programs,[167] clearly indicates that many of the benefits of Public Law No. 94-142 extend to handicapped students in private schools.[168] Determining the extent to which all of the substantive and procedural terms of Public Law No. 94-142 apply to private schools requires an examination of the conditions under which the private placement was made.

Many of the special education activities described by the EDGAR regulations provide special education supportive services to parochial school students. Testing and screening for potential educational handicaps, speech therapy, and consultant services are often provided private schools by public agencies.

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[154] *See* Filler, *et al.*, *Mental Retardation*, ISSUES IN THE CLASSIFICATION OF CHILDREN 20 (N. Hobbs ed. 1975).

[155] 20 U.S.C § 1413(a)(4)(B); 34 C.F.R. § 300.400.

[156] 29 U.S.C. § 794; 34 C.F.R. § 300.31.

[157] *See* 20 U.S.C. § 1413(a)(4)(A); 34 C.F.R. §§ 300.450-.460.

[158] 34 C.F.R. Part 300.

[158a] *Id.* Part 104.

[159] 20 U.S.C. § 1221e-3.

[160] 34 C.F.R. Part 76.

[161] 34 C.F.R. §§ 76.650-.661.

[162] 34 C.F.R. §§ 76.650-.661.

[162] 34 C.F.R. §§ 300.400-.403, 300.450-.460.

[163] The first amendment states that Congress shall make no laws concerning the establishment of religion. This prohibition has been made applicable to the states through the fourteenth amendment.

[164] 20 U.S.C. § 1413(a)(4)(A); 34 C.F.R. § 300.451.

[165] 34 C.F.R. § 300.451(a).

[166] 34 C.F.R. § 100b.651(a)(2).

[167] *Id.* § 100b.651(a)(1).

[168] Section 504 also applies to private schools if they (or their students) receive federal financial assistance.

The broader protections of Public Law No. 94-142 apply only to "handicapped students placed in or referred to a private school or facility by a public agency as a means of providing special education and related services."[169] Students in need of special education who cannot be served within the public school system and for whom a private placement is the only appropriate placement[170] should not be denied any substantive or procedural rights simply because they are required to attend private school. Thus, whenever a public agency is compelled to place a handicapped student in a private facility, steps are to be taken to ensure that the student is not denied a free and appropriate public education because of the private placement. For handicapped students referred to or placed by public agencies in private facilities, the following are required:

- The state educational agency must ensure that a free and appropriate education is afforded.[171]
- Before a public agency places a handicapped student in, or refers the student to, a private facility, the agency must conduct a meeting to prepare an IEP for the student. A representative from the private facility must attend the IEP meeting; if such a person cannot attend, the public agency must use some other means to allow the participation of the private school in the formulation of the IEP. After an IEP is written, public agency and parental participation in review of the IEP is required.[172]
- A public agency which places or refers a handicapped student to a private facility is always responsible for ensuring compliance with the provisions of the law and regulations concerning IEPs.[173]
- The state educational agency must monitor compliance by all private facilities with the law concerning special education, must inform the private schools of the applicable standards, and must allow private school participation in formulating the state plan.[174]
- The state and local educational agency must provide private school students an equitable chance to participate in federally funded special education programs.[175]
- The state and local educational agency must maintain administrative control over federal funds and federally-financed property that benefits students enrolled in private schools. Federal funds must not be used to finance the general needs of the school, but only to finance the costs of providing the special education services.[176]
- State and local educational agencies must consult with representatives of students enrolled in private schools prior to any decision that affects the participation of the private school students in federally-financed special education programs.[177]
- The local educational agency must ensure that the benefits it provides to private school students are comparable in quality, scope, and opportunity for participation to those provided to public school students.[178]
- The local educational agency may not spend more on private school pupils, on average, than on public school pupils unless the average cost of meeting the needs of private school students is different from the average cost of meeting the needs of public school students.[179]

For handicapped students voluntarily placed in private facilities by their parents or guardians, some of the same protections apply, but the most fundamental protections of Public Law No. 94-142 do not. Students voluntarily placed in private facilities benefit from some of the monitoring requirements of the statute and regulations but do not have the same rights to a free and appropriate education, to procedural protections, or to an IEP.[180] By voluntarily choosing private school special education, these students and their parents have abrogated most of their rights under Public Law No. 94-142.[181] Students in need of special education who are voluntarily placed in private facilities are entitled only to the following:

- An equitable opportunity to participate in federally-funded programs;[182] and
- Consultation with local educational agencies on the provision of special education programs or services to the private facility.[183]

While many private facilities may formulate IEPs for students voluntarily placed in the facilities, there is no legal requirement to do so in the federal statutes or regulations.[184] There is, on the other hand, nothing to prevent a state from requiring strict procedural and substantive protections for all handicapped students enrolled in private schools. These requirements could be implemented either through state statutes or regulations concerning the education of the handicapped or through statutes and regulations governing the licensing of private schools. Similarly states and local school districts could require, as a contractual obligation in return for the receipt of any state or federal funds, a commitment to extend all of the substantive and procedural rights set forth in Public Law No. 94-142 or Section 504 to all handicapped students enrolled in the private school.

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[169] 34 C.F.R. § 300.400; 20 U.S.C. § 1413(a)(4)(B).

[170] Under the requirements for an education in the least restrictive environment, private school placements should only occur where there is no less restrictive public school program available. *See* § 4.6 *supra*.

[171] 34 C.F.R. § 300.401.

[172] *Id.* §§ 300.347, 300.343.

[173] *Id.* § 300.347(c).

[174] *Id.* § 300.402.

[175] *Id.* § 100b.651(a)(1), (2).

[176] *Id.* §§ 100b.651(a)(3), 76.661, 100b.658.

[177] *Id.* § 100b.652.

[178] *Id.* § 100b.654.

[179] *Id.* § 100b.655.

[180] *Id.* §§ 300.450-.452.

[181] The protections of § 504 still apply if the private school receives federal financial assistance. 29 U.S.C. § 794; 34 C.F.R. § 104.1.

[182] 34 C.F.R. § 100b.651(a)(1), (2).

[183] *Id.* § 100b.652.

[184] The requirements of § 504 would apply if the private school receives any federal financial assistance.

With only limited federal protections available to handicapped students who are voluntarily placed in private facilities, it may be necessary to consider whether the placement was in fact voluntary. Students who were involuntarily placed in private facilities may be entitled to the same substantive and procedural rights as handicapped students who were referred to or placed in private facilities by public agencies. There are numerous instances in which parents have felt compelled to resort to self-help to obtain appropriate educational programs for their children. In those situations, after long periods of efforts to compel a local school district to provide appropriate educational services, parents, acting on their own initiative, have placed handicapped students in private facilities to obtain appropriate education. Many times, the student would have been effectively denied education unless the private placement were made because the public school was providing no educational services. The student may have been excluded from school for alleged disciplinary reasons or the school may not have employed qualified personnel to provide the appropriate programs or services.

In situations in which a handicapped student was voluntarily placed in a private facility as a direct result of a state or local educational agency's failure to comply with federal laws concerning special education, the private placement should be deemed to have been involuntary. The private placement should then be at public expense, with all of the procedural and substantive protections which would be available if the placement had been made directly by or had resulted from a public agency's referral. To receive these protections, however, a due process hearing will probably be necessary since state or local educational officials can be expected to refuse to finance a private placement they did not make. To succeed in this type of due process hearing, an advocate or parent would need to establish that each of the following is true:

- Attempts had been and were being made to compel the local school district and/or state educational officials to meet their responsibilities to provide a free and appropriate public education (FAPE) to the student. A complaint should have been initiated alleging a denial of FAPE[185] and asserting that the need for a private placement was provoked by a failure by the school to provide services during the pendency of the proceedings to resolve the complaint. (For example, a student expelled from school for disciplinary reasons[186] who was not receiving any educational services or a student who the school contends is not handicapped and therefore receives no services, might be able to successfully assert that an involuntarily private placement was necessary).

  While it is not necessary to do so, it would be beneficial to have a letter written to the responsible state and/or local officials describing the conditions leading to the private placement. This letter should also explain that the family will seek reimbursement for the costs of the private placement.[187]
- A new administrative complaint should be filed or the old complaint should be amended. This document should describe the manner in which FAPE was being denied and should ask for reimbursement of the costs of the private placement and for the provision of FAPE by local school officials. (Where appropriate, a complaint might be filed in state or federal court.)[188]
- Records should be maintained on all efforts to obtain appropriate programs and services and on all costs, both direct and indirect, for the private placement. In addition to the private school tuition and fees, allowable costs might include, *e.g.*, special admissions testing, transportation, and room and board.
- In order for the voluntary placement in a private school to be deemed a placement by or referral to the private school by a public agency, the parents or guardians of the student will have to win a hearing[189] at which they establish that (a) the student is handicapped and in need of special education programs or services, (b) a request for special education programs and services was made, (c) state and/or local educational officials failed to meet their obligations to provide a free and appropriate public education to the student and (d) this failure caused the private placement.

Once a hearing officer determines (or state and/or local educational officials are willing to agree) that the private placement was necessary, then the placement should be treated as if it were a placement by a public agency and the family should be reimbursed for the costs of the placement. In addition, if the private placement is not the least restrictive setting appropriate for the student,[190] the public agency should be required to initiate a more appropriate placement.

Because involuntary private placements occur with frequency, states should be required to monitor the placements [191] of all handicapped students in private facilities to determine that none is the result of educational officials' abrogation of their responsibilities under the laws concerning the education of the handicapped.

When a student is placed in or referred to a private institution, either residential or nonresidential, by a public agency, the public agency is charged with responsibility for overseeing the development of an individualized educational program for the student. The public agency is required to initiate and conduct the meetings to develop, review, and revise an IEP for the student.[192] These IEP meetings for a private school student must be conducted according to the same standards as those concerning students placed in public schools.[193] In addition, a representative of the private facility in which the student has been or will be placed must attend all these meetings. If this is impossible, other means of ensuring the participation of the private facility in writing the IEP, such as telephone consultations, must be arranged by the public agency.[194]

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[185] *See* ch. 5. *infra* (the administrative hearing process).

[186] *See* § 4.10 *infra* (the discipline of handicapped students)

[187] *See* § 5.2.1 *infra* (sample letter which can be adapted for use in this situation).

[188] *See* ch. 5. *infra*.

[189] *Id.*

[190] *See* § 4.6 *supra*.

[191] 34 C.F.R. § 300.348.

[192] *Id.* §§ 300.343, 300.348(a).

The state educational agency also has responsibilities to students placed in private facilities by public agencies or involuntarily placed in private facilities by their parents. For these students, the state educational agency must ensure that appropriate special education and related services are provided according to properly formulated IEPs and with the full protections and rights afforded under Public Law No. 94-142.[195] In addition, the state agency must ensure that these educational and related services are provided at no cost to the parents and according to the same state and federal standards that apply to public agencies.[196]

The requirement that educational and related services provided by private facilities be made available at no cost to parents when students are placed or referred by a public agency or when involuntarily placed there by parents because there is no appropriate program offered by the responsible public agency has proved to be particularly troublesome. An increasing number of handicapped students in need of special education are being denied services or being forced into complicated due process hearings because of disputes over who should be responsible for the costs of private placements. This is an issue of some magnitude since, in some exceptional cases, private placement can cost $30,000 or $40,000 a year.

Most often, disputes in this area concern disagreements between educational and social service agencies, *e.g.*, a child welfare or human services department, over who should pay the costs of a residential placement. The dispute usually focuses on whether the placement is made for educational reasons, with the social services agency arguing that the placement is primarily for educational reasons and that, as a result, an educational agency should be responsible for payment of costs. The educational agency, on the other hand, will typically argue that the student's educational needs are incidental to much more general needs so that the cost of a private placement should be paid by the social services agency.

Related to these issues are disputes concerning the extent, if any, to which parents should be required to contribute to the cost of private placements, regardless of the extent to which the placement is for educational reasons. Despite clear statutory and regulatory language that special education and related services must be afforded at no cost to the parents,[197] many families face requirements that they make some contributions to the cost of private placement.

The parents of handicapped students may be required to pay costs of fees similar to those required from nonhandicapped students.[198] However, the Section 504 regulations state that private placements must be afforded at no cost to parents, although funding may be sought from third parties, such as insurance companies.[199]

4.7.1 PAYMENT OF THE COSTS OF RESIDENTIAL PLACEMENT

The controversy surrounding the cost of a residential placement made by a school or agency centers on two questions: which agency should pay and what services must be paid for by that agency.

The first question raises several issues:

- Which local educational agency (LEA) is responsible for costs when a child is placed in a residential facility outside the city/town in which his/her parents reside?
- Who pays when the child has been placed in a residential facility by his/her parents?
- Must parents make contributions to cover the costs from insurance money they receive?
- Must the state pay the full cost of the child's private special education only if parents relinquish custody of their child to the state?
- Are state agencies such as the department of mental health responsible for at least part of the cost of a child's residential placement?

The child's advocate should have a thorough understanding of these concerns to ensure effective representation.

The other major question in this area concerns what services must be paid for by the LEA or other public agency. Many of the youth in residential placements are in need of 24-hour-a-day care to help them learn basic self-sufficiency or because their problems extend beyond those that become evident in school. Therefore, their education sometimes does not have the academic or intellectual focus traditionally associated with education. Other children need intensive counseling for emotional problems, counseling not traditionally considered educational in nature. School administrators argue that schools are only responsible for purely educational expenses, not other services that are part of a child's program while (s)he is in residential placement.

The intent of Congress in regard to handicapped children in private schools is clear:

> [S]pecial education and related services should be available to all children within the state as a matter of public responsibility. Thus, the bill requires that if a state or local educational agency has placed or referred the child to a private school or to another school or facility inside or outside of the state or local jurisdiction because the state or local educational agency did

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[193] *Id.* § 300.348(a).

[194] *Id.* § 300.348(b).

[195] *Id.* § 300.401(a), (b).

[196] 20 U.S.C. § 1413(a)(4)(B); 34 C.F.R. § 300.401(a).

[197] 20 U.S.C. § 1401(18); 34 C.F.R. § 300.4.

[198] 34 C.F.R. § 104.33(c)(1).

[199] *Id.*

> not have an appropriate program for the child, then the state or local education agency remains financially responsible for that child's education.[200]

However, congressional intent as to which agency should bear the costs of such placement is not clear, except that the cost is definitely not to be placed on the parents. The legislative history of Public Law No. 94-142 indicates:

> This provision [that residential placement is to be provided at no cost to parents] is designed to insure that students served by private facilities are treated equally with those in public schools and is not to be construed to prohibit charges by the educational agency to insurors, public programs, and others for hospital care, health services, rehabilitation, and other nonsupportive services.[201]

The expression of the intent of Congress does little to clarify who is responsible for the cost of a handicapped child's residential placement and what services must be paid for. There is, however, a clear distinction between placement by a parent and placement by a public agency in determining who must pay. If the child is placed by a public agency, the state educational agency must ensure that it is at no cost to the parents.[202] The state is not responsible for the cost of the education, however, if the parents voluntarily place the student.[203] However, even for those children placed by their parents, the public agency is still responsible for ensuring that services necessary for the provision of an appropriate education are made available to the child.[204]

This general rule requiring parents to pay the costs when they have placed the child applies only when the local school district can provide an appropriate education for the child in a nonresidential program but the parents reject the recommended program and place the child in a residential facility. The situation is different when the local school is unable to provide an appropriate placement and the parents are forced to send their child to private school. In such a situation, the legislative history of Public Law No. 94-142 indicates that a due process hearing is necessary to determine who should bear the expenses of the placement. It states:

> If a parent contents that he or she has been forced at the parents' own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under Section 614(5) applies.[205]

Whether parents are entitled to reimbursement for costs incurred prior to the due process hearing has not been definitively established. Some courts have held that, when parents have put their child in a private school because of the public school district's failure to provide an appropriate program, the parents are entitled to the cost of the private placement from the date of enrollment in the private school until the date an appropriate program is provided by the school district or an appropriate impartial due process review is concluded. Similarly, courts have granted parents reimbursement for the cost of placement in a private school while they awaited the outcome of a state administrative review of their complaint about the appropriateness of the child's educational program. Such relief is only granted if the hearing officer determines private placement is appropriate.[205a]

It is not clearly delineated whether state or local educational agencies are totally responsible for the cost of a child's education or whether other agencies concerned with meeting the child's needs (such as the department of mental health) must share in the expense. The only issue that is clear is that the state educational agency must ensure that some agency or agencies pay the costs so that parents are not required to pay. Many school districts have argued that social service agencies should be responsible for the cost of meeting a child's emotional needs. The regulations under Public Law No. 94-142 provide little guidance to determine whether this argument is valid. The regulations indicate that other agencies should share the costs of a child's residential placement. The regulations, however, are far from forceful and do not clearly require outside agencies to contribute toward a child's education. They state:

> Each state may use whatever state, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.[206]

Problems of who should pay for the child's residential placement often arise when the child is placed in a program outside the school district (s)he would have attended were (s)he not handicapped. Often the only appropriate program for a severely handicapped child is in another part of the state or even in another state. The issue becomes whether the responsibility for costs moves with the location of the child.

The regulations provide that "each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency."[207] The key lies in defining residency. The federal regulations provide no guidance. Rather, the matter is one of state law.

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[200] S. REP. NO. 168, 94th Cong., 1st Sess. (June 2, 1975).
[201] *Id.*
[202] 34 C.F.R. § 300.401(a)(2).
[203] *Id.* § 300.403(a).
[204] *Id.* § 300.403(c).
[205] S. REP. NO. 168, 94th Cong., 1st Sess. (June 2, 1975).

[205a] *See* App. A *infra* (case summaries).
[206] 34 C.F.R. § 300.301(a).
[207] *Id.* § 300.452(a).

The courts have consistently relied on state law in defining residency. For example, pursuant to Illinois state law, a child is a resident of the school district in which his/her parents reside. Thus, even if a handicapped child is placed in a private facility in another state, (s)he is still a resident of the school district in which his/her parents reside and that school district must provide the cost of his/her education. The determination of the school district responsible for providing the child with an appropriate education and paying the cost of that education is usually based on the child's legal residence and not the child's physical presence within a school district.[208]

If state law does not clearly define residence for some reason, public policy might suggest that a child in an out-of-state or out-of-district placement resides where he is placed. Such a policy would place an undue burden on schools in the vicinity of state and private institutions. To require these schools to be responsible for the cost of educating the children is certainly not part of the federal mandate. Placing the cost on the district of the parents' residence or on state agencies are the logical alternatives.

In any event, if there is a dispute over funding a residential placement, ultimate responsibility for ensuring that a student receives a free and appropriate education rests with the state commissioner or superintendent of education.[209] The state educational agency (SEA) must ensure that every handicapped child in the state has available a free appropriate public education (FAPE), regardless of which agency, state or local, is responsible for the child. While the SEA has flexibility in deciding the best means to meet this obligation, *e.g.*, through interagency agreements, there can be no failure to provide FAPE due to jurisdictional disputes among agencies. Therefore, if a student's education is being disrupted because of interagency disputes over funding, it is the state educational department against which action to resolve the problem should be taken.

The SEA, through its written policies or agreements, must ensure that IEPs are properly written and implemented for all handicapped children in the state. This applies to each interagency situation that exists in the state, including any of the following:

- When an LEA initiates the placement of a child in a school or program operated by another state agency;
- When a state or local agency other than the SEA or LEA places a child in a residential facility or other programs;
- When parents initiate placements in public institutions;
- When the court makes placements in correctional facilities.[210]

Frequently, more than one agency is involved in developing or implementing a handicapped child's IEP, for example, when the LEA remains responsible for the child, even though another public agency provides the special education and related services, or when there are shared cost arrangements. It is important that SEA policies or agreements define the role of each agency involved in the situations described above to resolve any jurisdictional problems that could delay the provision of a free appropriate public education to a handicapped child.[211]

State agencies may attempt to compel parents to use insurance proceeds to pay some residential placement costs. The regulations to both Section 504 and Public Law No. 94-142 state that in providing a free appropriate education to handicapped children, "[n]othing in this part relieves an insuror or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child."[212] This, however, does not require the child's parents to file insurance claims when it would cause them to incur a financial loss. The Secretary of Education has recently issued a notice of interpretation clarifying this issue.[213]

The Secretary interprets the requirements that a free appropriate public education be provided "without charge" or "without cost" to mean that an agency may not compel parents to file an insurance claim when filing the claim would pose a real threat that the parents of the handicapped student would suffer a financial loss not incurred by similarly situated parents of nonhandicapped children. Financial losses include, but are not limited to, the following:

> (1) A decrease in available lifetime coverage or any other benefit under an insurance policy;
> (2) An increase in premiums or the discontinuation of the policy; or
> (3) An out of pocket expense such as the payment of a deductible amount incurred in filing a claim.[214]

Parents are, however, obligated to file a claim when they would incur only minor incidental costs, such as the time required to complete the form or the postage needed to mail the claim. The notice also explains that if the policy has a deductible amount, the agency may insist that the parents file a claim if it pays for the services and the deductible amount in advance.

Not only who pays but what must be paid is an area of controversy. Public Law No. 94-142 requires that related services that are necessary for a student to benefit from special education must be provided at no cost to the parent.[215] However, LEAs are often reluctant to pay the cost of services that are necessary to meet a child's emotional needs. This controversy partly centers around the argument that psychological services are not clearly defined as a related service.[216] But even when psychiatric services are not needed and another form of emotional support or counseling is, LEAs argue that they are only responsible for educational costs. The definition of related services in the regulations, however, includes counseling, social work services, and psychological services,[217] thus indicating that serving a child's emotional needs is part of his/her special education program.

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[208] *See* App. A, § 125 *infra* (case summaries).

[209] 20 U.S.C. § 1413(a)(4); 34 C.F.R. §§ 300.2, 300.360.

[210] 34 C.F.R. § 300.2.

[211] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).

[212] 34 C.F.R. §§ 104.33(c)(1), 300.301(b). *See* 2 EDUC. OF THE HANDICAPPED L. REP. 257:56.

[213] 45 Fed. Reg. 86,390 (1980).

[214] *Id.*

[215] *See* 20 U.S.C. § 1401(17); 34 C.F.R. §§ 300.13, 300.4, 300.401.

[216] *See* § 4.1 *supra*.

4.7.2 ENSURING APPROPRIATENESS OF OUT-OF-DISTRICT PLACEMENTS

Whenever a handicapped student is placed in a program outside of the ones offered by his/her school district, issues can arise concerning responsibility for ensuring that the student's rights under the federal laws concerning education of the handicapped are met. This can be true regardless of whether this out-of-district placement is in a private day school, either within or outside of the school district's boundaries, a public or private residential school, or a facility run by another school district.

Ultimately, the state educational agency can be held responsible for ensuring that the Public Law No. 94-142 requirements are met.[218] An advocate should not have to resort to going to the state for resolution of problems in this regard, however. There are a number of procedures designed to protect students in out-of-district placements.

When an LEA is responsible for the education of a handicapped child, the LEA is also responsible for developing the child's IEP. The LEA has this responsibility even if development of the IEP results in placement in a state-operated, private, or out-of-district school or program. The IEP must be developed before the child is placed. When placement in a state-operated school is necessary, the affected state agency or agencies must be involved by the LEA in the development of the IEP.[219]

After the child enters the state school, meetings to review or revise the child's IEP could be conducted by either the LEA or the state school, depending upon state law, policy, or practice. However, both agencies should be involved in any decisions made about the child's IEP (either by attending the IEP meetings or through correspondence or telephone calls). There must be a clear decision, based on state law, as to whether direct responsibility for the child's education is transferred to the state school or remains with the LEA, since this decision determines which agency is responsible for reviewing or revising the child's IEP.[220]

When a child is placed out of state by a public agency, the placing state is responsible for developing the child's IEP and ensuring that it is implemented. The determination of the specific agency in the placing state that is responsible for the child's IEP would be based on state law, policy, or practice. However, the SEA in the placing state is responsible for ensuring that the child has available a free appropriate public education.[221]

4.8 RELATED SERVICES

As noted above, handicapped students are entitled under the federal statutes not only to appropriate special education but also to related services required to assist them to benefit from special education.[222] The right to receive related services is as important, in many cases, as the right to receive special education and is guaranteed as part of the right to free and appropriate education.[223]

Related services include, but are not limited to, such services as:

- Transportation;
- Speech pathology;
- Audiological services;
- Psychological services;
- Physical therapy;
- Occupational therapy;
- Recreation;
- Early childhood assessment and evaluation or identification;
- Counseling;
- Diagnostic medical services;
- School health services;
- Social work services;
- Parent counseling and training; and
- Artistic, musical, or dance therapy.

All related services are to be developmental, corrective, or supportive services required to assist a student to benefit from special education.[224]

The limits of the right to related services remain largely undefined. All of the types of related services are not necessary for every handicapped student. As is the case with other program and placement decisions, determinations about related services must rest upon assessments of the need to provide support so that students may benefit from regular special education services. In many schools, most of the related services listed above have never been available. For example, while school psychologists are often on school payrolls to conduct psychological evaluations, few school psychologists perform other psychological services, such as teacher consultation or individual student psychological counseling.[225] To have available such a wide range of related services may require that a school employ, either permanently or on a consultative basis, different types of certified personnel: school social workers, psychologists, nurses, medical doctors, speech therapists, physical therapists, occupational therapists, and others.

Unfortunately, the related services requirement places a significant financial burden upon school systems. This burden is one that many schools will attempt to shift to other public social service agencies which have either the responsibility or the authority to provide such services. Most typically, state mental health, juvenile justice, or youth services agencies will be looked to by schools seeking to ease their responsibilities for providing services to handicapped students. Often, the attempt to shift this responsibility will rest upon a theory that the services are not educational but instead are a form of treatment, which implies that the problem should be handled by some branch of the medical establishment.

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[217] *See* 34 C.F.R. § 300.13.
[218] 20 U.S.C. § 1413(a)(4); 34 C.F.R. §§ 300.2, 300.360.
[219] 46 Fed. Reg. 5460 (1981); 46 Fed. Reg. 19,000 (1981).
[220] *See* regulations cited note 219 *supra*.
[221] *Id.*
[222] 34 C.F.R. § 300.13.
[223] 20 U.S.C. §§ 1401(18), 1415(b)(1)(A); 34 C.F.R. § 300.4.
[224] 34 C.F.R. § 300.13(a).
[225] *See id.* § 300.13(b)(8).

Related services are often necessary to ensure the right to an appropriate education. While Section 504 and Public Law No. 94-142 provide different definitional status to related services, the purpose of related services under both statutes is clearly the same. Both pieces of legislation requiring a free appropriate public education to handicapped children recognize that related services may be an essential aspect of that education. The regulations under Section 504 incorporate related services into their definition of appropriate education. According to the regulation:

> The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met.[226]

While Section 504 does not provide a detailed list as to what constitutes related services, an analysis of the final regulations indicates that related services include "developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services)."[227]

The statutory language of Public Law No. 94-142 provides a far more detailed list of what constitutes related services. The statutory language of Public Law No. 94-142 is in accordance with Section 504 in providing that the term free appropriate public education means special education and related services.[228] The statute defines related services as

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.[229]

The regulations promulgated under Public Law No. 94-142 provide an even more extensive list of those services which qualify as related services. The regulations also include school health services, social work services in schools, and parent counseling and training as related services.[230]

The advocate should be aware that, while many of these related services are not purely educational in nature, when needed, they must be provided to ensure a handicapped child's right to an appropriate education. The child's IEP, the key to his/her appropriate education, must contain a statement of all services needed by the child. For example, a child with impaired motor functioning due to cerebral palsy and who, as a result, cannot easily manipulate a pencil, requires occupational therapy. Failure to provide such essential services would be a denial of the child's right to an appropriate education even though the child might receive adequate academic services.

The right to related services is essential to the concept of mainstreaming and education in the least restrictive environment. As noted above, all handicapped children have a right to education in the least restrictive environment. Every effort must be made to place a child in a regular classroom setting whenever possible. This does not mean, however, that the child should be placed in an environment which is beyond his/her abilities or does not meet his/her needs. The use of related services is essential for supplementing a child's education so that (s)he may participate in the regular classroom to the same extent as the nonhandicapped children.

Both the statutory language and regulations of Public Law No. 94-142 require the use of related services to supplement a child's special education. The statute provides that, to qualify for funding, the state must establish

> [p]rocedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services can not be achieved satisfactorily.[231]

The presumption, therefore, is that placement in a regular setting with the provision of related services is the preferred approach to placement. The statute further provides that LEAs must establish a goal of providing full educational opportunity to all handicapped children, including "the provision of special services to enable such children to participate in regular educational programs."[232] The regulations promulgated under Public Law No. 94-142 provide identical language to that of the statute,[233] reinforcing the need for use of related services to achieve education in the least restrictive environment.

The extent to which related services must be provided is not clearly articulated by the relevant legislation. While the definitions found in Public Law No. 94-142 are relatively straightforward and simple, the limits of this right to related services remain undefined. Even those services clearly articulated in the regulations, *e.g.*, transportation, health services, provide problems which may ultimately have to be judicially determined. An analysis of some of these areas will be helpful to the student's advocate when confronted with the situation.

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[226] *Id.* § 104.31(b).

[227] Comments to subpart D, 34 C.F.R. Appendix A.

[228] 20 U.S.C. § 1401(18).

[229] *Id.* § 1401(17).

[230] 34 C.F.R. § 300.13(a).

[231] 20 U.S.C. § 1412(5)(B).

[232] *Id.* § 1414a(11)(C)(iv).

[233] 34 C.F.R. § 300.550(b).

4.8.1 TRANSPORTATION SERVICES

Public Law No. 94-142 provides that transportation is a related service to be provided at no expense to handicapped children or their parents.[234] Pursuant to the statute's implementing regulations, transportation includes:

> (i) Travel to and from school and between schools;
> (ii) Travel in and around school buildings; and
> (iii) Specialized equipment (such as special or adapted buses, lifts, and ramps) if required to provide special transportation for a handicapped child.[235]

This regulation does not, however, adequately address the complex issues that frequently arise concerning transportation. For example, what if the parent of a handicapped child places his/her child in a private school but the school district is providing the child with special education services in one of the district's school buildings? Is the school district obligated to provide transportation between the private and public schools since the private placement was voluntary? Because the school district is responsible for making special education services available to the child and transportation is, as a related service, essential to the child's benefitting from his/her special educational program, one can argue that the LEA is responsible for providing transportation "between schools."

A more common situation involves transportation to a school other than a neighborhood school or to a private residential school. If a school district arranges for a parent to transport a handicapped child to a private residential school, it must reimburse the parent for reasonable transportation expenses. However, there is no clear policy interpreting the extent of reimbursement.

4.8.2 HEALTH SERVICES

The extent to which school health services must be made available to a handicapped child has not been clearly determined. The problem lies in the provision that, as related services, medical services are those used to determine which handicapping condition results in the child's need for special education and related services.[236] Thus, any medical service beyond that necessary to identify and evaluate a child as handicapped is not defined by the regulations as a related service. School health services,[237] however, are related services and must be provided in addition to those services used in evaluating a child. The difficulty arises in questioning whether a particular service which is medical in nature is a school health service or a medical service.

The most common example of this problem is the issue of catheterization. Children with spina bifida or other handicapping conditions often require intermittent catheterization, even though they may not be in need of other types of special education service. For these children, if catheterization is not provided, the only alternative may be homebound instruction. Controversy has arisen over whether catheterization should be classified as a medical service and, therefore, not qualify as a related service, or whether such service is a school health service which must be provided to children with this unique need.

In a policy interpretation under both Public Law No. 94-142 and Section 504 of the Rehabilitation Act, the United States Department of Education has declared that clean intermittent catheterization (CIC) is a related service when it is required to provide a free appropriate education, including services in the least restrictive environment, to handicapped students.[238] In reaching the determination that CIC is a related service, the Department decided that, because CIC is a fairly simple procedure which can be performed by any responsible person trained in the technique, CIC is not a medical service. The policy interpretation notes that a public agency is not, however, required to provide CIC to a student who is enrolled in a day program during the time when the student is not in school, or to provide routine medical services, such as laboratory analysis, that may be related to the provision of CIC.

4.8.3 OTHER RELATED SERVICES

The comment following Section 300.13 of the Public Law No. 94-142 regulations states: "The list of related services is not exhaustive and may include other developmental, corrective or supportive services (such as artistic and cultural programs, and art, music and dance therapy), if they are required to assist a handicapped child to benefit from special education."[239] This indicates that services not defined in the regulations may under certain circumstances constitute a related service. For example, a note-taking service for hearing-impaired students may be considered a related service if it is necessary for such a handicapped student to benefit from his/her special education.

One frequently requested service which is not clearly defined as a related service is psychotherapy. Psychotherapy is not clearly defined as either a counseling service or a medical service. The distinction is essential. As noted above, medical services are classified as related services only when used for purposes of diagnosis or evaluation. Educational agencies are not required to pay for medical treatment. Therefore, if psychotherapy is classified as a medical service it will not be considered a related service when used for purposes of treatment. Counseling services, on the other hand, are defined as required related services.[240] It should be noted that counseling services include services provided by qualified psychologists. When classified as a counseling service, psychotherapy should be considered a related service.

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[234] *Id.* § 300.13.

[235] *Id.* § 300.13(b)(13).

[236] *Id.* § 300.13(b)(4).

[237] *Id.* § 300.13(b)(10).

[238] *See* U.S. Department of Education, Office of Special Education, *Assistance to States for Education of Handicapped Children, and Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance; Notice of Policy Interpretation*, 46 Fed. Reg. 4912 (1981).

[239] Comments to 34 C.F.R. § 300.13.

Whether psychotherapy is considered a medical service or a counseling service is generally a matter of state policy. If a state classifies psychotherapy as a medical service, *i.e.*, administered by a licensed physician, then it is not a related service. If, however, the state allows psychotherapy by someone other than a psychiatrist, it may be considered a related service. The statute and regulations support the view that psychiatric services must be provided as related services when necessary for handicapped children to obtain the same benefits from education as nonhandicapped children.

4.8.4 PAYMENT OF COSTS OF RELATED SERVICES

Both Public Law No. 94-142 and Section 504 provide that related services are to be provided at no cost to the child or his/her parents.[241] Because compliance with the related services provision places such a significant financial burden upon school systems, many schools attempt to shift this burden to social service agencies. Often, the rationale for shifting this responsibility rests upon a theory that the services are "noneducational" and are a form of "treatment," implying that the problem should be handled by some branch of the medical establishment.

Handicapped students in need of related services often fall victim to the same long and bitter jurisdictional debates among social service or educational agencies which arise concerning private placements. During this period, the student is frequently denied all such services or receives inappropriate services.

A partial answer to this dilemma, which often seems the most frustrating special education problem for advocates, is set forth in Public Law No. 94-142 and its regulations. Under Public Law No. 94-142, the state educational agency which submits an application for federal funds under the law submits the application on behalf of the state as a whole; the SEA is responsible for insuring that the terms and provisions of the law are followed statewide.[242] The state educational agency is therefore compelled to insure that each public agency having either direct or delegated authority provide special education and related services under the terms of Public Law No. 94-142. This places the state educational agency in the position of being responsible for activities conducted not only in state, local, and intermediate educational agencies, but also in other state agencies, such as a department of mental health, state school for the deaf, or state correctional facilities. Ultimately, this requirement even gives the state educational agency authority over special education and related services provided privately at the request of public agencies.[243]

Perhaps the most confusing issue in a discussion of related services concerns whether a child can be provided with related services at no cost to his/her parents even though (s)he does not qualify for special education. Pursuant to the statutory language of Public Law No. 94-142: "The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."[244]

Similarly, the regulations promulgated under Public Law No. 94-142 provide:

> (a)(1)As used in this part the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.
>
> (2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.
>
> (3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.[245]

The Comment following these regulations indicates the importance of these special education definitions. A child is not considered handicapped unless (s)he needs special education. This leads to the conclusion that if a child is not receiving special education and therefore not considered handicapped, (s)he has no right to related services. Furthermore, the definition of related services indicates that only those services "as are required to assist a handicapped child to *benefit from special education*"[246] qualify as related services. The Comment following § 300.141 of the regulations specifies that "if a child does not need special education, there can be no 'related services,' and the child is not covered under the Act."

The advocate will probably be confronted with circumstances in which a child needs a related service but does not qualify for special education *per se*. This problem arises frequently with the issue of physical or speech therapy. For example, a child may be suffering from some type of crippling condition and be in need of physical therapy but not require any type of specifically designed instruction. The regulations suggest[247] that if a state defines physical therapy as special education, such therapy may be provided to a child who received no other special education. However, if a state defines such therapy as a related service, then it may be denied to a child who receives no special education. Most children in need of physical therapy are in need of specially designed physical education classes. Since Public Law No. 94-142 requires specially designed physical education classes as one element of special education[247a] for those students who need such services, it will constitute a related service for the children in these special classes.

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[240] 34 C.F.R § 300.13(b)(2).

[241] *See* 20 U.S.C. § 1401(18); 34 C.F.R. § 104.33(c)(1).

[242] 20 U.S.C. §§ 1412(1), 1413(a); 34 C.F.R. § 300.2b.

[243] *See, e.g.*, 34 C.F.R. § 300.

[244] 20 U.S.C. § 1401(16).

[245] 34 C.F.R. § 300.14.

[246] *Id.* § 300.13 (emphasis added).

This problem also arises in many other areas. For example, is a child who is receiving social work services,[248] but no special education as defined in the Act, considered a handicapped child? The advocate may decide that it is necessary to argue that the student is entitled to the full protections of Public Law No. 94-142 and/or Section 504. This should only be done, however, after carefully weighing the implications of such an approach. A significant drawback of the approach is the stigmatization which may result from being labeled a handicapped person.

The broad responsibility of a state educational agency to insure the provision of special education and related services pursuant to Public Law No. 94-142 makes that agency an obvious party, most often as codefendant, in special education litigation. However, despite the federal statute's clear mandate concerning a state agency's responsibility, the statutes in many states do not often afford the SEA either the means or authority to enforce that obligation against other state agencies.

4.9 DISCIPLINE OF HANDICAPPED STUDENTS

The federal laws safeguarding the rights of students with special needs have provisions for disciplining students identified as handicapped,[249] those with evaluations or appeals pending, and those who may be perceived as handicapped. The laws describe, in particular, the circumstances under which such students can be excluded from disciplinary suspension, expulsion or other exclusion.

Suspension and exclusion of handicapped students may be illegal under Public Law No. 94-142, as well as under Section 504 of the Rehabilitation Act of 1973. Such measures may also be illegal for students referred for evaluation or perceived to be handicapped; grounds for a finding of illegality include:[250]

- The right to a free appropriate public education which includes specially designed instruction to meet the student's individual needs;[251]
- The right to have any change in placement occur only through the prescribed procedures;[252]
- The right to an education in the least restrictive environment with maximum interaction with nonhandicapped peers;[253]
- The right to continuation of the current educational placement during the pendency of any hearing or appeal, or during any proceeding relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education;[254] or
- The right not to be excluded, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status.[255]
- The right not to be excluded, denied benefits, aids, or services, or be discriminated against on the basis of one's actual or perceived handicapped status.[256]

An expulsion or long-term suspension is an irreparable loss in the education of any child. The Supreme Court views suspension for ten days as a serious loss to a child, since

> 'education is perhaps the most important function of state and local governments,' *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), and the total expulsion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.[257]

The harm caused by extended expulsion or even by brief suspension from public school is even more damaging to a mentally retarded child or child with some other handicap than to a child without a handicap. The natural and predictable result of the exclusion of handicapped students who are denied appropriate individualized educational programs is a deterioration in their behavior and amenability to a regular educational experience.

Congress held the view that education is often the critical difference for a handicapped student between a productive or an institutionalized adult life.[258] The meaning of the statutory provisions enacted in Public Law No. 94-142 is made clear by a statement of congressional intent:

> In recent years federal and state courts, state legislatures and state executives have been increasingly upholding the principle that these children are legally and morally entitled to free appropriate public education. It is to this end that this amendment is addressed. For it establishes for the first time in federal policy

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[247] *Id.* § 300.14(a)(2).

[247a] *See* 20 U.S.C. § 1401(16); 34 C.F.R. § 300.307.

[248] This is a related service pursuant to 34 C.F.R. § 300.13(b)(1).

[249] This section is based largely on the unpublished work of Kathleen Boundy and Paul Weckstein of the Center for Law and Education, Cambridge, Massachusetts.

[250] *See also* App. A, § 140 *infra* (case summaries).

[251] 20 U.S.C. § 1401(16), (18); 34 C.F.R. §§ 104.33(b), 300.1, 300.4, 300.13, 300.14.

[252] 20 U.S.C. § 1415(b)(i)(C), (D); 34 C.F.R. §§ 104.36, 300.504(a), .504(b)(1)(ii).

[253] 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. §§ 104.34(a), 300.132, 300.227, 300.550-553.

[254] 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 300.513.

[255] 29 U.S.C. § 794, 34 C.F.R. § 104.4(a)(b).

[256] 29 U.S.C. § 794, 34 C.F.R. § 104.4(a)(b).

[257] Goss v. Lopez, 419 U.S. 565, 576 (1975).

[258] S. REP. NO. 168, 94th Cong., 1st Sess. 9 (1975).

> that handicapped children are entitled to an appropriate free public education.[259]

There is no provision in Public Law No. 94-142 suggesting that handicapped persons who were out of school because of disciplinary proceedings were exempt from coverage. The Act, by its terms, covers "all handicapped children" in the jurisdiction[260] and has no exceptions.

Public Law No. 94-142 requires that by September 1, 1978, state and local officials must have located and identified all children within the jurisdiction who were not then receiving an education.[261] Under the same timetable, a free appropriate public education "must be provided to all handicapped children . . . first with respect to handicapped children who are not receiving an education. . . ."[262] Local school districts which receive monetary assistance must also establish priorities for providing an education.[263]

Accordingly, under the Act, expelled handicapped students who were not receiving an education on September 1, 1978 were among the first priority for receiving a free appropriate public education and thus, for receiving the other protections afforded by Public Law No. 94-142.[264] The Act did not exempt expelled students, and as of September 1, 1978, state and local districts had a legal obligation to afford those students the appropriate education required by the Act.[265]

The legislative history of the Act further supports the position that it was intended to cover students out of school due to prior suspension or expulsion proceedings. In passing Public Law No. 94-142, Congress relied in large part on the decision in *Mills v. Board of Education of the District of Columbia.*[266] That decision, which was one of the first court decisions holding that handicapped children had a right to a publicly provided education, was brought in part by students denied an education after having been excluded from school as "behavior problems."[267] In requiring that school officials educate those students and provide them substantive rights,[268] the court did not exempt students absent from school due to past disciplinary proceedings. Instead, the school officials were directed to locate and identify expelled or suspended students[269] and to provide those students with an education.[270]

In addition to the statutory and regulatory requirements under Public Law No. 94-142, schools are also bound by the requirements of the Rehabilitation Act of 1973 and its implementing regulations. The regulations under Section 504 apply not only to those who have received federal assistance for special education, but to recipients of any federal assistance. The regulations under Section 504 indicate that:

> [a] recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction regardless of the nature or severity of the person's handicap.[271]

The regulations under Section 504 indicate that a school district "may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part [i.e., June 3, 1977]." The regulations go on to indicate that educational agencies:

> [s]hall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.[272]

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[259] [1974] U.S. CODE CONG. & AD. NEWS 4146.

[260] 20 U.S.C. § 1412 (2)(B).

[261] *Id.* §§ 1412(2)(C), 1414(a)(1)(A).

[262] *Id.* § 1412(a).

[263] *Id.* § 1414(a)(1)(C)(ii).

[264] In fact the section of the 1975 amendments to P.L. 94-142, which requires a properly drawn individualized educational program for each child in a special education program, became effective on October 1, 1977. *See* 20 U.S.C. § 1412(4), (6); 34 C.F.R. § 300.343(b). Those amendments required all procedural safeguards to be in place by that date as well. 20 U.S.C. § 1412(5).

[265] 20 U.S.C. § 1412(3); 34 C.F.R. §§ 300.320-.324.

[266] 348 F. Supp. 866 (D.D.C. 1972). *See* S. REP. NO. 168, 94th Cong., 1st Sess. 6, 22-23 (1975); H.R. REP. NO. 332, 94th Cong., 1st Sess. 6, 22-23 (1975); H.R. REP. NO. 332, 94th Cong., 1st Sess. 3 (1975). In introducing the bill which became the EHA, Senator Williams, a cosponsor, referred specifically to *Mills.* 121 CONG. REC. 19485 (1975). *See also* Note, *Enforcing the Rights to An 'Appropriate' Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979).

During the EHA hearings in both the 93rd Congress and the 94th Congress, legislators and witnesses emphasized the importance of the *Mills* decision. *See Education for All Handicapped Children, 1973-1974: Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93rd Cong., 1st Sess. 341 (1974) (Statement of Sen. Edward M. Kennedy); *id.* at 371-73 (1973) (Statement of Prof. Gunnar Dybwad); *Education of the Handicapped Act Amendments: Hearings on H.R. 4199 Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 93rd Cong., 1st Sess. 45 (1973) (statement of Marcia Burgdorf); *Financial Assistance for Improved Educational Services for Handicapped Children: Hearings on H.R. 70 Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 93d Cong., 2.d Sess. 189 (1974) (statement of Patricia Wald), *id.* at 226 (1974) (statement of Ass't Att'y Gen. J. Stanley Pottinger). *See also Education for All Handicapped Children 1975: Hearings on S.6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 40 (1975) (remarks of Sen. Harrison A. Williams, Jr.); *Extension on the Education of the Handicapped Act: Hearings on Part X Education and Training of the Handicapped and H.R. 7217, Education for All Handicapped Children Act of 1975 Before the Select Subcomm. on Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 51 (1975) (remarks of Rep. John Brademas).

[267] Mills v. Board of Educ. of the Dist. of Columbia, 348 F. Supp. 866, 869 (D.D.C. 1972).

[268] These protections were nearly identical to those enacted in Pub. L. No. 94-142. *See* 348 F. Supp. at 878-883.

[269] 348 F. Supp. at 879.

[270] *Id.* at 878.

[271] 34 C.F.R. § 104.33(a).

[272] *Id.* § 104.34(a).

GUIDELINES GOVERNING THE DISCIPLINE OF HANDICAPPED STUDENTS

Handicapped students who engage in misbehavior and disciplinary infractions are subject to normal school disciplinary rules and procedures so long as such treatment does not:

- Abridge the right to free appropriate public education;
- Change the student's current educational placement without employing the prescribed procedures;
- Violate the "least restrictive environment" principle;
- Violate the student's right to continue in his/her current placement during any due process proceedings; or
- Discriminate against the student on the basis of his/her actual or perceived handicapping condition.

The IEP team for a handicapped student should consider whether particular discipline procedures should be adopted for that student and included in the IEP.

Handicapped students may be excluded from school but only in emergencies and only for the duration of the emergency and never for more than 10 days cumulatively in a school year.

After an emergency suspension is imposed on a handicapped student, an immediate meeting of the student's IEP team should be held to determine the cause and effect of the suspension with a view toward assessing the effectiveness and appropriateness of the student's placement and toward minimizing the harm resulting from the exclusion.

The suspended student should be offered alternate educational programming for the duration of the exclusion.

4.9.1 DISCIPLINARY EXCLUSION

The only instance in which a disciplinary exclusion is permitted under Public Law No. 94-142 is in an emergency situation necessitated by a threat to health or safety, or a threat of substantial disruption of the school community. An emergency situation should be defined as one in which the student is violent and presents an ongoing danger or threat of physical injury to himself/herself or others or where the student's conduct is so disruptive over a lengthy period of time that normal classroom activities cannot possibly continue, and this ongoing threat of injury or disruption cannot be reduced or eliminated by less exclusionary means.

Students facing possible suspension are entitled to procedural due process protections.[273] Where an emergency situation justifies a delay in the normal hearing procedures for a suspension, a preliminary hearing should be held as soon as practicable, and in no case later than 72 hours after the removal of the student from his/her regular educational placement.

Continuance of the suspension shall be permitted only as long as the emergency situation exists. In no event should a student with an IEP or a pending evaluation or appeal be suspended for more than ten days cumulatively in a school year.

4.9.1.1 The Right to Changes in Placement Through Prescribed Procedures[273a]

Parents must be notified in writing within a reasonable time before a school district proposes to change the placement of a handicapped student.[274] The notice must explain all procedural rights available to the parents and describe the proposed action, the basis for the school's decision, other options considered, and the reasons for their rejection. This notice must be comprehensible to the parents, be in the parent's native language unless clearly not feasible, or otherwise effectively communicated where the parents' mode of communication is not a written language.[275]

The members of the student's IEP team must reconvene to review his/her current IEP and to consider other available placement options.[276] The school district must make a concerted effort to ensure parental participation; the district must properly notify parents of the meeting, agree on scheduling, provide alternative means of participation, and act to ensure that the parent understands the proceedings. If warranted, or if the student's parent or teacher requests it, the student for whom a change of placement is being considered shall also be reevaluated.[277]

Parental consent is not required in changing the placement of a handicapped student who is receiving special education services to a more restrictive placement. However, the parent, after receiving notice of the proposed change of placement, has a right to complain about the educational placement or the provision of a free appropriate public education to the student.[278] Furthermore, the parent has the right to an impartial hearing concerning any complaint or, *inter alia*, any proposal to change the placement of his/her student or the provision of a free appropriate public education.[279]

4.9.1.2 The Right to an Education in the "Least Restrictive Environment"

Both Public Law No. 94-142 and Section 504 guarantee handicapped students the right to participate in regular classroom and extracurricular activities with nonhandicapped students to the greatest extent practicable while receiving an appropriate education.[279a] Public Law No. 94-142, which describes this right in terms of the "least restrictive environment" (LRE), requires assurance by state and local education agencies that "special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." The language of the Section 504 regulations is similar.[280]

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[273] Goss v. Lopez, 419 U.S. 565 (1975).

[273a] *See also* § 5.3 *infra*.

[274] 20 U.S.C. § 1415(b)(1)(C); 34 C.F.R. §§ 104.36, 300.504(a).

[275] 20 U.S.C. § 1415(b)(1)(D); 34 C.F.R. § 300.505.

[276] 34 C.F.R. § 300.533.

[277] *Id.* § 300.534.

[278] 20 U.S.C. § 1415(b)(1)(E).

[279] 20 U.S.C. § 1415(b)(2); 34 C.F.R. §§ 104.36, 300.506(a). *See* Hairston v. Drosick, 423 F. Supp. 180 (S.D. Va. 1976) (due process); Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

Public Law No. 94-142 establishes procedures which replace expulsion as a means of removing handicapped children from school if they become disruptive. The comment to 34 C.F.R. § 300.552 concerning least restrictive placements quotes the analysis of the Section 504 regulations, which states: "[I]t should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs. . . ."[281]

The right to placement in the "least restrictive environment" is implemented, in part, by requiring schools to provide alternative education placements through which a student can receive an appropriate education while maximizing interaction with nonhandicapped peers. Expulsion would deny a handicapped student such interaction. Hence, the provisions requiring a free appropriate education in the LRE limit expulsions and suspensions to emergency situations. In no case can a student be excluded for more than ten days without providing a due process hearing in accordance with the procedures of Public Law No. 94-142.[282]

An emergency situation means that issues of health, safety, or substantial disruption are involved, *i.e.*, a child is dangerous to himself or others, or his/her behavior is so disruptive that it impairs the education of other children in the classroom. In this limited instance, school officials are not precluded from suspending a student,[283] but not for more than 10 school days in an academic year. Moreover, for an emergency suspension to be warranted, all less restrictive alternatives for dealing with the handicapped student must have been considered, tried, or rejected as inappropriate.[284] To comply with the LRE requirements, an emergency exclusion must be used only as the last resort for eliminating the substantial disruption or the danger to health or safety.

4.9.1.3 The Right to Continue in Current Educational Placement During Due Process Proceedings

Section 20 U.S.C. § 1415(e)(3) of Public Law No. 94-142 provides:

> During the pendency of any proceedings conducted pursuant to this section, unless the State or local education agency and the parents or guardian otherwise agree, *the child shall remain in the then current educational placement* of such child, or, if applying for initial admission to a public school shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.[285]

This section concerns proposals to change or refusal to change the identification, evaluation, or placement of a handicapped child.[286] It provides that a parent is entitled to complain "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;"[287] and it provides that the parent has a right to a hearing concerning any complaint or proposal to initiate or change or refusal to initiate or change the identification, evaluation, or educational placement of the student.[288] Other provisions concern procedural safeguards, appeals, and judicial actions.

Based on the statutory language of 20 U.S.C. § 1415(b)(2), quoted above, it seems clear that the right to remain in one's current educational placement encompasses students once they are referred for an evaluation even though they have not been identified as handicapped under the Act. However, the regulation is underinclusive in requiring that the *status quo* be maintained "[d]uring the pendency of any administrative or judicial proceeding regarding a complaint unless the parents of the child agree otherwise. . . ."[289]

Public policy favors this statutory construction. Given the purpose of the law and the nature of the evaluative requirements, it would be counterproductive to change the placement of a student who is under evaluation for special education services.

As a strategic matter, whenever a student who has been referred for an evaluation engages in misbehavior subject to suspension or expulsion, a parent, upon receiving notice of the suspension or expulsion, should immediately file a complaint under 20 U.S.C. § 1415(b)(1)(E). Whether challenging the student's suspension, or evaluation, the complaint entitles the parent to a hearing.[290] While the complaint proceedings are pending, the student is entitled to continue in his/her current educational placement.[291]

The conflict between 20 U.S.C. § 1415(e)(3) and the disciplinary procedures of public schools is addressed by the federal government in a comment to the regulations. In essence this comment states that while a student's placement may not be changed during the pendency of any complaint proceedings, a school district is not precluded from using its normal procedures for dealing with students who are endangering themselves or others.[292]

[279a] 20 U.S.C. §§ 1412(5)(B), 1414(a)(1)(C)(iv); 34 C.F.R. §§ 104.34, 104.4(b)(1)(iv)(3), 300.132, 300.227, 300.550-.553. *See also* § 4.6 *supra*.

[280] 34 C.F.R. § 104.34(a). *See also* Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866, 880 (D.D.C. 1972); Pennsylvania Ass'n of Retarded Citizens v. Pennsylvania, 343 F. Supp. 279, 307 (E.D. Pa. 1972).

[281] 34 C.F.R. Part 104, app. A, Subpart D, para. 24.

[282] 20 U.S.C. §§ 1415(b)(1)(C), 1415(b)(1)(D); 34 C.F.R. §§ 300.504(a), 300.505, 300.533, 300.534. *See also* Goss v. Lopez, 419 U.S. 565 (1975) (expulsion for more than ten days requires due process protections).

[283] *See* 34 C.F.R. § 300.513, Comment; 42 Fed. Reg. 42,473, 42,496 (1977).

[284] *See* 34 C.F.R. § 300.505.

[285] Emphasis added.

[286] 20 U.S.C. § 1415(b)(1).

[287] *Id.* § 1415(b)(1)(E).

[288] *Id.* § 1415(b)(2).

[289] 34 C.F.R. § 300.513.

[290] 20 U.S.C. § 1415(b)(2); 34 C.F.R §§ 104.36, 300.506(a).

[291] 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 300.513.

4.9.2 RIGHT NOT TO BE PUNISHED ON THE BASIS OF HANDICAP OR FOR THE SCHOOL'S FAILURE TO PROVIDE AN APPROPRIATE EDUCATION

Handicapped students or students referred for evaluation should not be disciplined for conduct related to a handicap or which is the result of an inappropriate or inadequate educational program or placement. Any such action would be challengeable under the statutory entitlements of Public Law No. 94-142, the nondiscrimination provision of Section 504, and the equal protection and due process clauses of the fourteenth amendment.

4.9.2.1 Conduct Related to Handicapping Condition

When disciplinary action is challenged by a student classified as handicapped or referred for evaluation on the basis of his/her statutory entitlements, it is not necessary to demonstrate a connection between the student's conduct and his/her handicapping condition.

For strategic reasons students classified as handicapped or referred for evaluation should always challenge disciplinary suspensions on the basis of their statutory entitlements. However, when the behavior is strongly linked to the handicap, the student should argue under Section 504 that (s)he is being discriminated against on the basis of his/her handicap. For example, students who have been identified as emotionally disturbed may be less able to control frustration or anger than other students and may engage in disruptive behavior, interrupting and challenging authority figures. Students who are mentally retarded may have poor social adjustment skills related to their handicap.

Section 504 of the Rehabilitation Act prohibits any recipient of federal financial assistance from discriminating against a handicapped person or a person considered or treated as handicapped on the basis of his/her handicap.[293] Regulations implementing Section 504 make clear that no handicapped person should be denied an appropriate education "regardless of the nature or severity of the person's handicap."[294] Furthermore, pursuant to these regulations, an appropriate education must be designed to meet the "individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . ."[295] and such education must be provided with nonhandicapped students to the "maximum extent appropriate."[296] While these provisions reflect the legislative intent not to treat handicapped persons disparately, other implementing regulations contain explicit nondiscriminatory language. Specifically, 34 C.F.R. § 104.4(b)(1) provides that a school may not, on the basis of handicap:

> i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service. . . .
>
> vii) . . . limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service.

4.9.2.2 Conduct Resulting from Inappropriate Educational Program or Placement

School authorities may not impose disciplinary sanctions on students for conduct resulting from the school's failure to provide an appropriate educational program or placement.

Congress provided that each state and local educational agency accepting federal funds for the education of handicapped children must have a plan to ensure that each handicapped student is evaluated.[297] Evaluations must be comprehensive, assessing "all areas related to the suspected disability including . . . social and emotional status."[298] The regulations also state that "[i]n interpreting evaluation data and in making placement decisions, each public agency shall . . . draw upon information from a variety of sources, including . . . adaptive behavior."[299]

The educational program for each student must include any related services necessary for the student to be able to benefit from special education.[300] Necessary related services include counseling services,[301] which federal regulations define as "services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel."[302] Related services include, therefore, services designed to help handicapped students with behavioral problems.

Certain handicapping conditions are characterized in part by behavioral difficulties. Federal regulations define "mentally retarded" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a student's educational performance."[303] "Seriously emotionally disturbed" is defined as "a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance: . . . inappropriate types of behavior or feelings under normal circumstances."[304] Therefore, an individualized educational program must address the student's behavioral needs as well as other special needs.

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[292] *See* 34 C.F.R. § 300.513, Comment; 42 Fed. Reg. 42,473, 42,512 (1977).

[293] 29 U.S.C. § 794; 34 C.F.R § 104.3(j).

[294] 34 C.F.R. § 104.33(a).

[295] *Id.* § 104.33(b).

[296] *Id.* § 104.35.

[297] 20 U.S.C. §§ 1412(2)(C), 1414(a)(1)(A); 34 C.F.R. §§ 104.32, 300.128, 300.220.

[298] 34 C.F.R. §§ 104.35(b), 300.532(f).

[299] 34 C.F.R. §§ 104.35(c), 300.533(a)(1).

[300] 20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 104.33.

[301] 20 U.S.C. § 1401(17).

[302] 34 C.F.R. § 300.13(b)(2).

[303] *Id.* § 300.5(b)(4).

Because an appropriate educational program must be responsive to the unique needs of each student's handicapping condition, the participants of each student's IEP team should consider possible behavioral manifestations of the student's handicap. Accordingly, no in-school disciplinary sanctions should be imposed which are inconsistent with the conclusions and recommendations set forth in the IEP.

4.9.2.3 Personal Culpability and Status

Punishing a student for conduct which is related to his/her handicap or for the school's failure to provide an appropriate program designed to meet his/her unique needs violates the student's right not to be punished in the absence of personal guilt. For example, in one federal appellate court decision, it was determined that it was a denial of substantive due process to suspend a student and transfer the student to another class because her mother had assaulted the teacher.[305] The court rejected arguments alleging that the school's action was nonpunitive and justifiable as a means of restoring order and protecting the teacher's authority. The court stated: "Traditionally, under our system of justice, punishment must be founded upon an individual's act or omission, not from his status, political affiliation, or domestic relationship."[306]

Courts have also held that it is a violation of equal protection to penalize persons for their status or for characteristics over which they have no control.[307]

4.9.3 RIGHT OF FREEDOM FROM DISCRIMINATION FOR STUDENTS NEVER CLASSIFIED AS HANDICAPPED OR REFERRED FOR EVALUATION

4.9.3.1 Students Who Are Handicapped But Not Identified As Handicapped

Many students who engage in persistent misbehavior are in fact handicapped under definitions of Public Law No. 94-142, Section 504 of the Rehabilitation Act, or state statutes which may be broader in scope. Schools may label such students as behavioral problems for purposes of excluding them from the regular education program through suspension, expulsion, or transfer to so-called alternative education programs (*e.g.*, for the "socially maladjusted").[308] By labelling such students as behavioral problems instead of referring them for evaluation, schools may seek to circumvent the requirements of the federal handicap statutes. Nevertheless, it should be argued that it is illegal to suspend or expel a student for misbehavior, with the sole exception of an emergency suspension, if the student is handicapped but has not been identified as such or referred for an evaluation.

State and local educational agencies are required to identify, locate, and evaluate all handicapped children residing within their jurisdictions.[309] Any nonemergency suspension or expulsion of a handicapped student who has not been identified or evaluated would arguably violate the student's right to a free appropriate public education in the least restrictive environment. In addition, school officials who have failed to provide an appropriate education would, upon suspending, expelling, or otherwise disciplining a student with behavior problems who is handicapped, be punishing the student for their failure to provide the student an appropriate education; the student would be punished for the officials' violation of Public Law No. 94-142 and Section 504.

4.9.3.2 Students Who Have Serious Behavioral Difficulties and Are Treated as If Handicapped

Students with serious behavioral difficulties, who may not need special education but who are perceived as handicapped, are protected by Section 504 of the Rehabilitation Act of 1973.

The statutory definition of a handicapped individual in Section 504 is notable for its breadth:[310]

> "Handicapped person" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.[311]

These general characteristics are further defined under Section 104.3(j)(2)(i)-(iv):

> (i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin, and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emo-

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[304] *Id.* § 300.5(b)(8)(i)(C).

[305] St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974).

[306] *Id.* at 425. *See also* Debra P. v. Turlington, 474 F. Supp. 244, 267 (M.D. Fla. 1979) (students who were victims of segregation, social promotion, and other educational ills should not have been denied diplomas for failing a new functional literacy test).

[307] *See, e.g.*, Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175 (1972) (illegitimacy); Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966) (indigency).

[308] *See* 34 C.F.R. § 300.5(b)(8)(ii).

[309] 20 U.S.C. §§ 1312(2)(C), 1414(a)(1)(A); 34 C.F.R. §§ 104.32, 300.128, 300.220.

[310] 29 U.S.C. § 706 (as amended by § 111(a) of the Rehabilitation Act Amendments of 1974).

[311] 34 C.F.R. § 104.3(j). *See* § 1.4 *supra*.

> tional or mental illness, and specific learning disabilities.
>
> (ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> (iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> (iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.[312]

In determining who is handicapped, Section 504, like Public Law No. 94-142, relies on general categories, but, unlike it, takes into consideration whether a student functions or is treated as though handicapped. Thus, students who have never been classified as handicapped or referred for an evaluation may also be protected by Section 504.

A student whose behavior is sufficiently serious to warrant exclusion from school for a lengthy period of time is arguably being treated by school officials as is (s)he were handicapped. Substantive due process requires that the punishment imposed for behavior problems in school be reasonably related to a public school obligation under the education clause of its state constitution and statutes (including compulsory education laws) to educate all children. The school's interest in excluding a student for a lengthy period of time must not outweigh the student's right to be educated.[313] Furthermore, any serious disparity between the offense and the punishment may be challenged as a violation of substantive due process. It can be argued, therefore, that unless the student had an ongoing problem of sufficient seriousness to warrant long-term exclusion, the exclusion is invalid. If the student's behavioral difficulties are, in fact, so severe as to warrant such a harsh penalty, the student may come within the categorical definitions of handicapped under Section 504 or Public Law No. 94-142 (*e.g.*, seriously emotionally disturbed; mental/emotional illness which limits his/her ability to learn) or at least may be treated by the school as though (s)he were seriously emotionally disturbed.[314]

This argument may be buttressed by the student's records, reflecting the manner in which (s)he is perceived by school authorities (*e.g.*, "incorrigible," "amoral," "emotionally maladjusted," "disruptive").[315] By identifying and labelling students as behavior problems, schools may be establishing a basis for removing and excluding students from the regular school program and avoiding compliance with the substantive provisions of Public Law No. 94-142.

In defining who is handicapped, Section 504 does not rely on categorical labels like mentally retarded, seriously and emotionally disturbed, or learning disabled. It is less stigmatizing for children to be identified as having serious behavioral difficulties resulting from long-term exclusion because they were treated as handicapped by the school than to be labeled under Public Law No. 94-142.

Another example in which students are treated as handicapped but are prevented from receiving an appropriate education concerns the use of alternative educational programs. Some states have established alternative education programs for students with behavior problems who are labelled "socially maladjusted" because this category is expressly excluded from the categorical definition under Public Law No. 94-142 of "seriously emotionally disturbed."[316] Although these programs function as separate special education programs, the school districts ignore all evaluation, programming, and placement requirements of the federal statutes.

Under these circumstances an argument can be made that these students are being treated as handicapped by school authorities and thus, are entitled to the protections of Section 504. Once it is established that these students come within the broad definition of Section 504, they are entitled to its nondiscriminatory provisions.[317]

It may also be argued that students excluded from school who have never been classified as handicapped or evaluated should be provided an appropriate, alternative education. This argument is based on the theory that schools are treating them as if they are handicapped by excluding them for behavioral reasons. These students arguably come within the broad definition of 34 C.F.R. § 104.3(j) because they have records of being handicapped (*e.g.*, by an emotional disorder) or are treated as handicapped by the school and thus are entitled to the protections of Section 504.[318]

4.9.4 THE SCHOOL BOARD IS NOT AN APPROPRIATE FORUM

Most expulsions and nonemergency suspensions are determined by the local school board. To allow the local school board to use a school disciplinary proceeding to determine the nature of a handicapping condition and its appropriate treatment is to undercut the procedural due process protections related to the education of the handicapped. As discussed above, an expulsion or nonemergency exclusion for more than 10 days cumulatively in a school year constitutes a change in educational placement.

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[312] 34 C.F.R. § 104.3(j)(2).

[313] Cook v. Edwards, 341 F. Supp. 307 (D.N.H. 1972).

[314] 34 C.F.R. § 104.31(j)(2)(iv).

[315] *Id.* § 104.3(j)(2)(iii).

[316] *Id.* § 300.5(b)(8)(ii).

[317] *Id.* § 104.4(b).

[318] *See* Mills v. Bd. of Educ. of Dist. of Columbia, 348 F. Supp. 866, 882-83 (D.D.C. 1972).

A change in placement can only occur through the prescribed procedures of the federal laws pertaining to the handicapped. Among these procedures is the requirement that any placement decision be made by a trained and specialized group of persons.[319]

Moreover, federal statutes and implementing regulations guarantee the right to impartial hearings to settle disputes between parents and students and educational authorities. These procedural protections include hearings and procedures to afford "[a]n opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such a child."[320] The Section 504 regulations contain a similar provision.[321]

Certainly the existence of a handicapping condition and the nature of its secondary symptoms are issues appropriate for a special education due process hearing. Likewise, expulsion involves appropriate placement, change in placement, or even removal from placement; all are suitable issues for a special education due process hearing. These due process hearings for special education matters must be conducted by impartial hearing officers under Public Law No. 94-142:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an *impartial due process hearing*.[322]

Section 504 similarly provides:

> A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that include notice, an opportunity for the parents and guardian of the person to examine relevant records, *an impartial hearing* with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of Section 615 of the Education of the Handicapped Act is one means of meeting this requirement.[323]

The United States Department of Health, Education, and Welfare defined the characteristics of an impartial hearing officer on two separate occasions. In the regulations promulgated under Public Law No. 94-142, H.E.W. noted:

> A hearing may not be conducted: (1) By a person who is an employee of a public agency which is involved in the education or care of the child, or (2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.[324]

Some controversy remained over whether local school boards themselves could sit as impartial hearing officers in special education cases. H.E.W. clarified its position on August 14, 1978 when it issued an official policy interpretation under Section 504. The declaration could not be more clear: "School board members may not serve as hearing officers in proceedings conducted to resolve disputes between parents of handicapped children and officials of their school system."[325]

Statutory and regulatory provisions clearly establish the right to impartial due process hearings with respect to any complaint relating to identification, evaluation, educational placement, or the provision of free appropriate education for handicapped students. When a handicapped student or his/her parent contests a school's attempted disciplinary exclusion of the student, a complaint under Public Law No. 94-142 and Section 504 exists and the due process hearing mechanism is triggered. Clearly, insofar as the use of local board members has been found to be inadequate to insure impartiality, the use of a regular school discipline hearing conducted by the local school board is insufficient to afford handicapped students the procedural protections to which they are entitled.

4.10 MANDATED MINIMUM COMPETENCY TESTING[326]

Minimum competency testing to determine grade-to-grade promotion, class placement, and receipt of a high school diploma is being implemented in 36 states and many local school districts. The new testing requirements are designed to ensure educational integrity of the high school diploma, to eliminate the practice of social promotion, and to reverse a perceived trend toward diminishing proficiency in the basic skills on the part of the nation's students and recent graduates.

Significant legal and fundamental fairness problems for all students are inherent in many minimum competency testing programs, particularly those that impose responsibility or serious sanctions directly on students for test failure.[327] For example, some programs use test results to determine school readiness and class placement for prospective first-grade students. Other programs use test results to determine grade-to-grade promotion or class placement. A third type of competency testing program denies high school diplomas to students who fail the test even though the students have successfully completed all the other requirements for a diploma.

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[319] 34 C.F.R. §§ 104.35(c)(3), 300.533(a)(3).

[320] 20 U.S.C. § 1415(b)(1)(E).

[321] 34 C.F.R § 104.36.

[322] 20 U.S.C. § 1415(b)(2) (emphasis added).

[323] 34 C.F.R. § 104.36 (emphasis added).

[324] *Id.* § 300.507(a).

[325] 43 Fed. Reg. 360.36 (1978).

[326] An earlier version of this section first appeared in Pullin, *Mandated Minimum Competency Testing: Its Impact on Handicapped Adolescents*, 1 EXCEPTIONAL EDUCATION QUARTERLY 107 (Aug. 1980).

[327] See McClung, *Competency Testing: Potential for Discrimination*, 11 CLEARINGHOUSE REV. 439 (Sept. 1977).

Test results from minimum competency testing programs indicate that members of some minority groups perform less well than do white, middle-class students. Competency tests used to make critical decisions about awarding diplomas, and about class and grade placement may, therefore result in new forms of racial segregation, discrimination, and the denial of federally guaranteed constitutional and statutory civil rights. In addition, these programs have generally been implemented with little phase-in time to afford any student, black or white, or his/her school an adequate opportunity to prepare to meet the new test requirements.

Federal requirements concerning the education of the handicapped in Public Law No. 94-142, Section 504, and their implementing regulations do not expressly address the issue of mandated minimum competency testing. An examination of the federal standards indicates several circumstances in which state or local minimum competency testing has conflicted with federal mandates concerning the education of the handicapped.

Major problems with competency testing of the handicapped concern the extent to which handicapped students should participate in or be exempt from the testing program, whether tests and scoring criteria should be adapted for individual handicapped students or categories of students, and whether differential diplomas should be awarded to handicapped students on the basis of test performance. With the considerable disparity in requirements and methods of implementation among the various state and locally mandated minimum competency testing programs, the only constant variables in a legal analysis of the programs are the federal requirements concerning the education of the handicapped.

4.10.1 PARTICIPATION OF THE HANDICAPPED IN MANDATED MINIMUM COMPETENCY TESTING

Once minimum competency testing is mandated to determine awarding of regular high school diplomas, the extent to which the handicapped should participate in the program must be considered. Educators and parents making this decision must be aware of several trends, some of them ongoing, that have marked the history of special education, particularly at the high school level.

First, handicapped students have been segregated from so-called "regular" programs, "regular" classrooms, and sometimes even from the buildings where the nonhandicapped attend school. Often this segregation has entailed an almost total omission of academic subjects, even basic reading and mathematics; stressed instead are prevocational, vocational, or "life skills" programs which do not provide the strong basic skills usually assessed on a minimum competency test.

Second, handicapped students have frequently been placed in ungraded classrooms and programs in which students of different chronological ages are grouped. Here there is no presumption of yearly grade-to-grade promotions and students often remain with one teacher for more than one year. There are few instances of social promotion because it is not expected that handicapped students will progress by grade levels.

Third, it has been a practice in many school districts to award special diplomas or certificates of completion to handicapped adolescents in lieu of the regular high school diploma. This practice is entirely consistent with the philosophy evidenced by the practices outlined above: handicapped students are not capable of functioning successfully in the world of the nonhandicapped.

Fourth, there has been a pattern of placing a disproportionate number of minority and economically disadvantaged students in special education classes. This is most obvious in programs for the educable mentally retarded; conversely, classes for the learning disabled are populated primarily with white, middle-class students. This placement practice leads to the misclassification of many children into dead-end, nonacademic programs from which they do not emerge until they drop out, are pushed out, or complete 12 years of schooling. In addition, this practice exacerbates the disproportionate failure rate on minimum competency tests among racial minorities.

Given this history, some states and local school districts have across-the-board exemption from testing for the handicapped. However, exempting the handicapped from such tests conflicts with the federal requirement that handicapped students must participate to the maximum extent appropriate in regular educational programs.[328] If full participation in the regular program is the standard, with removal from the regular program to occur only where individually appropriate, then schools must make available to all students programs in which they can work toward a regular high school diploma. Students can be placed in a course of studies not designed to give them a regular diploma only if their needs can be appropriately served solely in the nondiploma program. Likewise, once minimum competency testing has been mandated for students, the testing becomes part of the regular educational program and handicapped students are entitled to participate.

Under this legal standard, no blanket exemptions from the mandated testing programs are acceptable for handicapped students or for specific handicaps. However, categorical exemptions for handicapped students have occurred in various states and local school districts on the basis of handicap alone, because of a particular handicapping condition, or because of a place of enrollment, with exemptions for private school, institutionalized, and incarcerated students. All students presumably should take the test and be eligible for regular high school diplomas. Eligibility for a regular high school diploma is particularly important since the diploma is the symbol of successful participation in the educational process.

Neither fairness, the law, nor sound educational practice requires the full participation of all handicapped students in mandated minimum competency testing programs. Federal laws requiring full participation in mandated programs are to be applied to each student individually, with modifications in the program permissible only to the maximum extent appropriate.[329] The application of this standard may mean that individuals with certain types of handicaps, such as profound retardation, will not participate in the testing program. However, on the basis of the federal requirements, these students should be evaluated individually to determine their participation, if any, in the program. In each instance, this evaluation should assess the student's capabilities, the nature of the skills and knowledge covered on the test, and the extent to which the student can reasonably be expected to master the skills and knowledge assessed on the minimum competency test.

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[328] 20 U.S.C. § 1412(5); 34 C.F.R. §§ 104.34, 300.550-.556.

4.10.2 SPECIAL ACCOMMODATIONS FOR THE HANDICAPPED IN MINIMUM COMPETENCY TESTING

Once it has been determined that a particular handicapped student is capable of mastering the skills and knowledge covered on the minimum competency test, educators must decide whether any special accommodations must be made so that the student can take the test. Special educators focus on individual differences. Those who espouse minimum competency testing, however, advocate a minimum level of homogeneity in the student population. Mandated minimum competency testing can accommodate little diversity among students without undercutting the most fundamental goal of the testing movement: ensuring minimal levels of proficiency from all students who receive a regular high school diploma.

Changes in how the test is administered, instead of changes in the level of proficiency, will likely be the only modifications acceptable to test proponents. Test givers may be required to offer such accommodations as large-print or braille versions for the visually impaired, or an all-written format for the hearing-impaired, but little modification beyond this level can be expected.

Altering the skills tested and the criteria for mastering them for handicapped students opens the door to a variety of problems. Test givers who seek to ensure minimal competencies for all students receiving a regular diploma should be encouraged to apply lower passing scores for handicapped students and to define different skills for them.

If the only accommodation for the handicapped that can be expected in most testing programs is varied formats, handicapped students and their parents should demand that those accommodations be implemented fairly. The modified tests must be valid measures of the minimum competencies being assessed.[330] Professional standards require educators to establish a test's validity before using it, but such efforts do not usually include a determination of whether the test is a valid measure for handicapped students. Special alterations for the handicapped require extensive scrutiny so that the test's validity or reliability is not impaired.

If a test is not demonstrably valid for handicapped students, if it inaccurately measures those skills it was intended to measure both as originally designed and as modified for administration to the handicapped, its use would violate Section 504's prohibition against "discrimination on the basis of handicap." The test, intended to evaluate students according to basic skills competence, would instead be unlawfully differentiating students according to handicapping condition.

4.10.3 USE OF INDIVIDUALIZED EDUCATION PROGRAMS IN MANDATED MINIMUM COMPETENCY TESTING

Decisions about mandated minimum competency testing and special accommodations for the handicapped must be made on an individual basis. This can only occur if parents and educators work together to determine the student's ability to participate in the testing program and, when participation is possible, the extent of special accommodation needed. The meeting of the individualized education program (IEP) team is the appropriate forum for addressing these issues.

Where minimum competency testing is mandated as part of the regular educational program and where federal law requires that the IEP determine the extent to which a handicapped student will participate in the regular program, the IEP should include a description of the extent of the student's participation in the minimum competency testing program. A student's participation in such testing should be addressed at an IEP meeting well in advance of potential participation. For example, for a test that is to be administered for the first time in the sophomore or junior year of high school, the IEP team should begin no later than junior high school to work on the annual goals and short-term instructional objectives to prepare the student for the test. Indeed, many educators contend that the IEP team should address the issue at the start of the student's school career.

In a testing program that allows special accommodations for the handicapped, the IEP team can determine what accommodations are needed. These accommodations should then be described in full in the IEP, perhaps in the related services section.

In schools where the testing program will allow different definitions of minimum competence, the IEP team can play an even greater role. If the mandated minimums for high school graduation can be varied so that the same skill performance is not expected of every student, the IEP team can determine the minimums for individual handicapped students. An IEP or a series of IEPs would then be written to define the student's long and short term educational goals, and to identify the services needed to meet such goals. If the student achieved the goals in the IEP for the end of high school, (s)he would then be awarded a regular diploma; if the goals were not met, no diploma would be awarded.

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[329] 20 U.S.C. § 1401(19); 34 C.F.R. §§ 104.34(a), 300.340.

[330] *See* STANDARDS FOR PSYCHOLOGICAL TESTING, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION (1974).

4.11 SERVICES FOR CHILDREN OUTSIDE THE USUAL AGES OF SCHOOL ATTENDANCE

Under Public Law No. 94-142, states were required to ensure that by September 1, 1980 a free, appropriate public education would be available to all children between the ages of 3 and 21 in need of special education. The only circumstance where this need not be met is if the federal requirement is inconsistent with "state law or practice" or a court order concerning the education of children aged 3 through 5 and 18 through 21.[331] However, once state law, court order, or state or local practice provides educational services to any handicapped children in these age groups, then services must be offered to all children in that age group with the same disability. Likewise, if any services are provided to nonhandicapped children in these age groups, then services must be offered to the same proportion of handicapped children in that age group. Finally, if services are provided to 50 percent or more of the handicapped children in any disability category in any of these age groups, then services must be made available to all handicapped children of that age and category.[332]

An advocate representing a handicapped student aged 3 through 5 or 18 through 21 often must look for alternatives to services offered by the public school system to find appropriate services for the client. Often, other social service agencies, both public and private, must provide such programs and services. Many times, the programs can be provided through the local school system but only after the advocate has devised a scheme for effectively delivering the services.

4.11.1 PRESCHOOL PROGRAMS FOR THE HANDICAPPED: PROJECT HEAD START

Federally-funded Project Head Start programs are a primary source of publicly-funded services for preschool age handicapped children.[333] These programs are organized primarily for low-income youngsters[334] to provide them with health, nutritional, educational, social, and other services. The programs are funded by grantee agencies and fall under the jurisdiction of the Department of Health and Human Services, Office of Human Development Services, Administration for Children, Youth, and Families.

Federal law mandates that no less than ten percent of total Head Start enrollment slots should be available to handicapped children.[335] Handicapped children are defined as they are under Public Law No. 94-142, *i.e.*, children who are mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, or specifically learning disabled and who, by reason of the disability, require special education and related services.[336] Federal officials estimate that, in 1979, approximately 190,000 handicapped children nationwide were eligible for Head Start services.[337] Following the 10 percent handicapped participation first mandated in 1972, approximately 96 percent of all Head Start programs had enrolled handicapped children.[338] This rate of participation is usually achieved because of active recruitment by Head Start programs and active referral networks of other social service agencies.

Head Start projects function under the "Head Start Performance Standards."[339] Compliance with the Performance Standards is required as a condition of federal Head Start funding; the federal government, however, regards the Performance Standards as largely self-enforcing. Each grantee is required to submit a plan for implementation of the Performance Standards. The Department of Health and Human Services does offer a Head Start Policy Manual with suggestions and guidances for programs implementing the Performance Standards.[340]

Among the programs and services typically offered by Head Start are:

- Staff and services to meet the needs of children with limited English-speaking abilities;[341]
- Health services (medical, dental, mental health, nutrition) to assist in physical, emotional, cognitive, and social development and to promote preventive health practices, and early intervention through (i) Health screening for every participant; (ii) Screening for the special needs of the handicapped; (iii) Immunization; (iv) Dental check-ups and dental care;
- Health education, including mental health services, and family health education;
- Nutrition services, including family nutrition education, and consultation on family nutrition practices;
- Regular meals and snacks;
- Social services, including services provided in collaboration with other public and private social service agencies; and
- Parental training and, if parents consent, home visits (at least three times per year for full year programs).

Parental participation is a key element in Head Start programs. Parental participation is required in several ways. Every parent is encouraged to be an active participant, both at home and at the Head Start center, in the educational decisionmaking and programming for the child. In addition, many parents serve as paid or volunteer staff members in Head

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[331] 20 U.S.C. § 1412(2)(B); 34 C.F.R. §§ 300.122, 300.300.

[332] 34 C.F.R. § 300.300(b).

[333] 42 U.S.C. § 2928; 34 C.F.R. Parts 1201-1305.

[334] At least 90% of the participants must be from low-income families, including families receiving public assistance.

[335] 42 U.S.C. § 2928(b)(e); 34 C.F.R. § 1305.5.

[336] 20 U.S.C. § 1041(1).

[337] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF HUMAN DEVELOPMENT SERVICES, ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES, HEAD START BUREAU, THE STATUS OF HANDICAPPED CHILDREN IN HEAD START PROGRAMS 1 (Feb. 1980).

[338] *Id.* at 2.

[339] 34 C.F.R. §§ 1031-05.

[340] Office for Civil Rights Notice N-30-364-4 (July 1975) (*reprinted in* DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HEAD START POLICY MANUAL (Sept. 1979)).

[341] 34 C.F.R. § 1304.2.

Start programs. Every Head Start program must employ or designate a paid or volunteer Coordinator of Parent Activities to help bring about appropriate parent participation.[342]

Parental participation in Head Start policy groups is also required by the federal government.[343] Each grantee agency receiving and administering Head Start funds must maintain a Head Start Policy Council composed of at least 50 percent parents with children presently enrolled in the program: other participants must include community representatives. Each agency administering a Head Start program must also have a Head Start Policy Committee which has parent members as 50 percent of its composition, plus representatives of the community. Finally, each individual Head Start center must maintain a Head Start Center Committee composed of parents whose children are currently enrolled at the center. For any center with several classes, a separate parent committee for each class is recommended, but not required. All parents who serve on such policy groups are to be elected by their fellow parents and are to serve nonrenewable terms of no longer than three years.[344]

The manner in which Head Start services are delivered varies from program to program. When originally developed, Head Start services were provided exclusively in a year-round, five day per week, classroom format. Now, local flexibility is encouraged, as long as the level of services is maintained and the needs of children are met. Among the permissible locally-designed variations, which must be approved by federal funding personnel, are programs in which the children remain at home. Such programs focus on the parents as educators and bring supportive services to the home.

For the handicapped child enrolled in a Head Start program, the evaluation services already provided to all Head Start participants are intensified to screen for all of the handicapped child's developmental needs. Once a developmental profile of the handicapped child has been formulated, necessary services are identified and an individualized educational program (IEP) is written.[345] Because Head Start programs are designed to provide more than educational services, the scope of an IEP can be broader than it might be for an elementary or secondary student. While an IEP team and a school system might disagree about whether a handicapped student is entitled, at school expense, to medical, dental, and other health services as part of "related services,"[346] there can be no such dispute in Head Start because Head Start is expressly required to provide medical, dental, and health services to all its participants.

For Head Start programs which are not home-based, most programming for the handicapped focuses on mainstreaming. Because Head Start was designed to work with youngsters, all of whom are presumed to be educationally disadvantaged, the programs and their personnel were already prepared to offer the skills and services needed by the handicapped before the mandated ten percent inclusion of the handicapped. Therefore, in many instances, the least restrictive environment requirement presents no problem. In addition, inclusion of the handicapped in these preschool programs has been facilitated by the fact that the younger students involved have not developed the biases and attitudes which would exclude or stigmatize handicapped students. Inclusion of the handicapped in Head Start fosters positive attitudes toward the handicapped by youngsters at an age when few prejudices have developed.

All Head Start programs are encouraged to assist children in the transition from Head Start to elementary school. In addition, to benefit children exiting from Project Head Start programs, the federal government has funded Project Follow Through.[347] Follow Through is designed to provide assistance in the kindergarten and primary grades of elementary schools to children leaving Head Start or other similar compensatory educational programs.

Under the regulations concerning Project Head Start, parents of Head Start participants also have the following rights concerning their childrens' Head Start health records:

- To obtain information about the kind of data to be collected concerning participants and about the uses of that data, and assurances that uses of the data will be restricted to the stated purposes;
- To give consent for forwarding records to a school and/or health delivery system when the child leaves the Head Start program; and
- To obtain a summary of the students' health records, including a summary of immunization history and follow-up treatment.[348]

4.11.2 COMPENSATORY EDUCATIONAL SERVICES FOR STUDENTS BEYOND THE ORDINARY AGE FOR SCHOOL ATTENDANCE

There are many handicapped students in need of special education and related services who have been excluded from education in the past or denied appropriate educational services. These students may have their remedial educational needs met in the overall effort to provide appropriate individual educational programs and services. However, when students reach 22 or the age at which normal school attendance is terminated,[349] other ways to obtain appropriate compensatory or remedial educational services may have to be used. While Public Law No. 94-142 at 20 U.S.C. § 1415(e)(1) allows courts to grant "such relief as the court determines is appropriate," a right to compensatory or remedial educational services if there have been past denials of such services and where the student is beyond the ordinary age for school attendance is not explicit. The goal of such relief should be to place the student in the same position (s)he would have been in if educational officials had not defaulted on their responsibility to provide the student with a free and appropriate public education. The theories for relief and methods for obtaining it might be similar to those articulated under Title VI of the Civil Rights Act of 1964.[350] These remedies were developed to "make a person whole for injuries suffered on account of unlawful . . . discrimination." No retroactive remedies are available to undo the unlawful discrimination which prevented students from receiving the services in the first place.

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[342] *See generally id.* § 1304.5.

[343] *Id.*

[344] *See Program Options for Project Head Start*, 40 Fed. Reg. no. 126 (June 30, 1975) (*reprinted in* DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, HEAD START POLICY MANUAL (Sept. 1979)).

[345] The IEP is required pursuant to Pub. L. No. 94-142 and its implementing regulations. *See* 20 U.S.C. § 1401(19); 34 C.F.R. § 300.342. It is also required under the Head Start Performance Standards, HEAD START POLICY MANUAL (Sept. 1979).

[346] *See* § 4.9 *supra*.

[347] 42 U.S.C. § 2929.

[348] *See* sources cited note 345 *supra*.

[349] 20 U.S.C. § 1412(2)(B); 34 C.F.R. § 300.122.

Broad-based compensatory relief for clients denied appropriate services will likely extend only as far as a link to denials after the implementation dates for Public Law No. 94-142 or Section 504 can be shown.

For many handicapped students over 16 years of age in need of special education programs and services, the advocate may find that the most successful avenues for obtaining appropriate services are those available through federally-funded vocational rehabilitation programs.[351] These programs, often run through a state department of education or a local or intermediate educational agency, are designed to promote self-sufficiency for older handicapped individuals. The types of services provided include counseling services, tutorial services, related and medical services, and direct financial assistance for such purposes as financing a student in a program of vocational or higher education.

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[350] 42 U.S.C. § 2000e(5)(g).

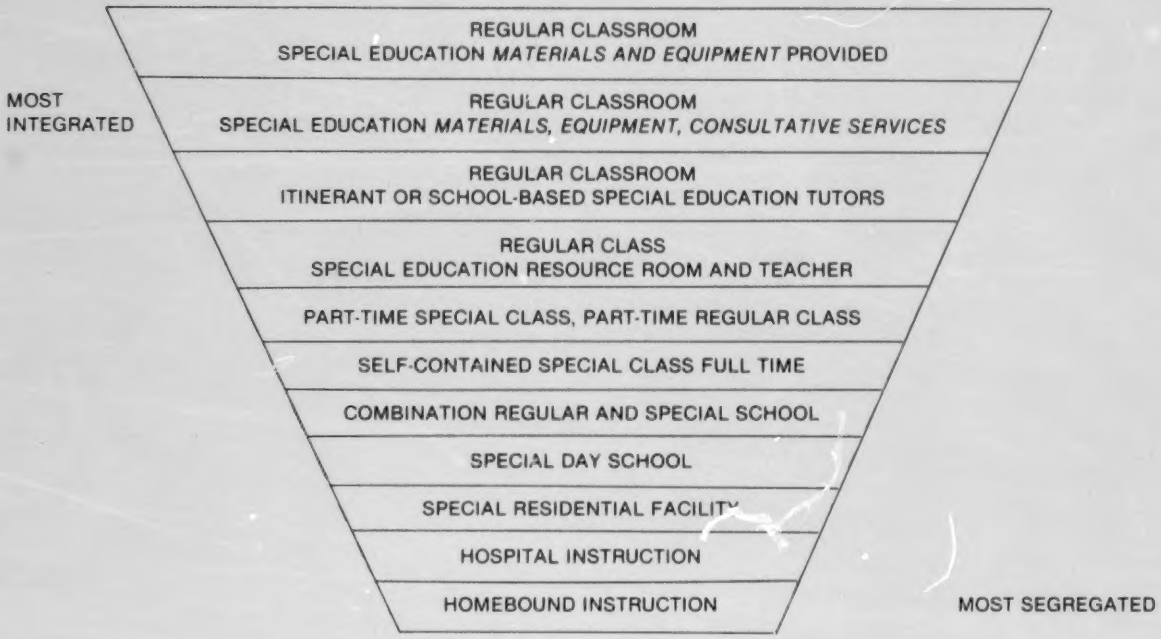
[351] These programs are established under 34 C.F.R. Part 361 and 20 C.F.R. Part 416.

APPENDIX 4A
EXCERPT FROM IEP FOR MARIE

PRESENT LEVELS OF PERFORMANCE	ANNUAL GOAL	SHORT-TERM OBJECTIVES	SERVICES	PERSONNEL	START DATE	PROJECTED DURATION	EVALUATION CRITERIA, PROCEDURES
Marie causes daily fights with classmates on playground. Fights involve biting, kicking, hitting, hair-pulling by Marie.	Marie will not cause physical fights with classmates on playground.	1. Will use verbal discussion rather than physical acting-out in expressing disagreement or anger with classmates.	Playground supervisor will intervene in fights, discuss with Marie and classmate involved; Report and log incidents for teacher. Classroom teacher will follow-up with private discussion with Marie. Marie will be denied recess privileges if physical fights continue. Marie will be given textbook *Friends* in her reading group.	Mrs. James, classroom teacher and Ms. Goodnight, playground supervisor	9/1/80	6 months	Log of all events will be kept. Number of negative and positive behaviors will be recorded.
		2. Will identify situation on the playground in which her interests and those of her classmates conflict.			9/1/80		
		3. Will identify her interests in a conflict and those of classmates with whom she is in conflict.			10/1/80		
		4. Will identify and implement compromise to eliminate disagreements with classmates.			1/1/81		

APPENDIX 4B
LEAST RESTRICTIVE ENVIRONMENT

"THE CASCADE OF SERVICES" MODEL FOR EDUCATIONAL PLACEMENT AND PROGRAMMING[1]


REGULAR CLASSROOM
SPECIAL EDUCATION *MATERIALS AND EQUIPMENT* PROVIDED
MOST INTEGRATED
REGULAR CLASSROOM
SPECIAL EDUCATION *MATERIALS, EQUIPMENT, CONSULTATIVE SERVICES*
REGULAR CLASSROOM
ITINERANT OR SCHOOL-BASED SPECIAL EDUCATION TUTORS
REGULAR CLASS
SPECIAL EDUCATION RESOURCE ROOM AND TEACHER
PART-TIME SPECIAL CLASS, PART-TIME REGULAR CLASS
SELF-CONTAINED SPECIAL CLASS FULL TIME
COMBINATION REGULAR AND SPECIAL SCHOOL
SPECIAL DAY SCHOOL
SPECIAL RESIDENTIAL FACILITY
HOSPITAL INSTRUCTION
HOMEBOUND INSTRUCTION
MOST SEGREGATED

GOALS

MOVE PUPIL DOWN ONLY AS FAR AS NECESSARY, MOVE UP AS SOON AS POSSIBLE

MAXIMUM INDIVIDUALIZATION: Fit the Setting to the Child, Not the Child to the Setting.

MAXIMUM INTEGRATION: Of Children With Special Needs With Typical Children, in as Normal a Setting as Possible.

MAXIMUM MOVEMENT: Of Children With Special Needs From More Restrictive Alternatives to Less Restrictive Alternatives.

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[1] Deno, *Special Education as a Developmental Capital*, 37 EXCEPTIONAL CHILDREN 235 (1970) (based upon Reynolds, *A Framework for Considering Some Issues in Special Education*, EXCEPTIONAL CHILDREN 367 (1962)).

CHAPTER 5

ADMINISTRATIVE HEARINGS AND APPEALS

5.1 INTRODUCTION

Public Law No. 94-142 gives students and parents the right to a due process hearing on a broad range of complaints about the special education process. The statute provides "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[1] Any special education issue can be addressed through the Public Law No. 94-142 hearing mechanism, for there is no special education issue which does not fall within the categories of "identification," "evaluation," "educational placement," or "provision of a free appropriate public education." For a student already receiving services under the statute, issues relating to formulation or implementation of the IEP, transportation, payment for residential or private placement, and participation in extra-curricular activities (on the theory that such activities are part of the educational program) would all be appropriate for administrative hearing or appeal. For students not receiving services under the statute, administrative hearings may be initiated to resolve problems of identifying, or failing to identify, students who need special education.

According to Public Law No. 94-142, the right to initiate an administrative hearing rests solely with parents or surrogate parents.[2] However, implementing regulations permit both parents and educational officials to obtain administrative hearings on issues concerning identification, evaluation, placement, or the provision of free appropriate public education.[3] Only one situation is specified in which educational officials may initiate an administrative hearing. A public agency may contest a parent's right to a publicly-funded independent educational evaluation and may request an administrative hearing to show that its own evaluation is appropriate.[4]

The specific mechanism for administrative due process hearings varies from state to state. The federal statute permits the initial hearing to be conducted at either the state, local, or intermediate educational agency level.[5] If the initial due process hearing is conducted at the local or intermediate level, then Public Law No. 94-142 requires the state educational agency to offer an opportunity for appeal to a state-level due process hearing.[6]

5.2 STRATEGIES FOR AVOIDING ADMINISTRATIVE HEARINGS

5.2.1 SETTLEMENT OF DISPUTES

Attempts should always be made to resolve informally complaints against a local educational agency or a state department of education. Informal resolution is less expensive, less time-consuming, and potentially more satisfactory than administrative and/or judicial proceedings. Attempts at informal resolution should begin as soon as a problem becomes evident so that hostility and ill-will between the parties will not escalate.

As previously discussed in Chapter 4, on many occasions school officials will be very receptive to information an advocate has gathered about different strategies or approaches to the solving of an individual student's problems. A second approach to resolve complaints informally involves sending educational officials a firmly worded letter indicating the nature of the complaint and the existing legal protections.[7]

Advocates who have attempted to resolve educational problems informally with a *Wood* letter have had fairly high rates of success. In addition to resolving a controversy, a *Wood* letter informs educational officials about the client's legal rights. Thus, any defense based upon a good faith ignorance of the law may be limited.[8] In addition, in most states, the letter can initiate a complaint about providing a free, appropriate public education and can trigger the special education administrative review process. State laws on special education may be a critical variable here, however, since some states may specify a different mechanism for initiating a complaint. Depending upon the nature of the advocate's relationship with the school district, the personalities involved, timing, or other variables, an advocate may choose to inform the school orally of the same facts and legal rights set forth in a *Wood* letter, perhaps with a written follow-up to the conversation.

In *Wood* v. *Strickland*, the United States Supreme Court established the right of public school students to receive monetary damages for acts committed by school board members. Damages are available, under *Wood*, for violations of "basic, unquestioned constitutional rights" of students.[9] These damages can be assessed against an individual educational official under 42 U.S.C. Section 1983 if the official "[knew] or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."[10]

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[1] 20 U.S.C. § 1415(b)(2).

[2] *Id.*

[3] 34 C.F.R. § 300.506(a).

[4] *Id.* § 300.503(b). If the public agency prevails, the parent is still entitled to an independent evaluation, but must pay for the evaluation. *See* § 3.2 *supra*.

[5] 20 U.S.C. § 1415(b)(2).

[6] *Id.* § 1415(c).

[7] *See* App. 5A *infra* (sample *Wood* letter). This letter was developed on the basis of standards set forth in Wood v. Strickland, 420 U.S. 308 (1975).

[8] The Supreme Court has held that a municipality has no immunity from liability under 42 U.S.C. § 1983 (a probable basis for a claim for relief in any special education litigation) and that a municipality may not assert the good faith of its officers as a defense for such liability. Owen v. City of Independence, Missouri, 100 S.Ct. 1399 (1980). The Court had previously held that municipalities are not immune from suit under § 1983 when the constitutional deprivations at issue resulted from official policy or governmental custom, even if the custom did not receive formal official approval. Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978) (overruling Monroe v. Pape, 365 U.S. 1967).

5.2.2 GRIEVANCE PROCEDURES UNDER SECTION 504

In addition to administrative hearings under Public Law No. 94-142, other courses of action are available through additional procedures under Section 504. Any federal aid recipient that has 15 or more employees is required to designate at least one person to coordinate compliance with the statute and to adopt grievance procedures to resolve complaints of noncompliance with Section 504.[11] Advocates representing individuals alleging Section 504 violations should determine if a Section 504 grievance mechanism exists and if it can benefit the client.

Grievance procedures must incorporate "appropriate" due process standards to ensure prompt and equitable resolution of grievances. The regulations do not detail either the terms for processing Section 504 grievances or the types of relief which might be afforded a successful grievant. According to comments to the regulations, details of the grievance mechanism are up to the discretion of each grant recipient.[12] No indication is given, in either the regulations or the comments thereto, of the kinds of redress possible through the grievance process. The comments to the regulations do indicate that there is no requirement that grievance procedures be exhausted before recourse is sought from the Office of Civil Rights of the United States Department of Education. However, the issue of whether the grievance mechanism should culminate in informal mediation, binding arbitration, or some other method of dispute resolution is left entirely to the discretion of the federal aid recipient.

Many educational institutions have ignored, knowingly or not, the grievance procedure requirement. Other institutions use the same grievance procedure for Section 504 as they use for grievances filed under Title IX of the Education Amendments of 1972 (nondiscrimination on the basis of sex in education programs and activities receiving or benefitting from federal aid).[13] In either case, any grievance mechanism which has been established will probably use an employee of the institution as the grievance officer. In most cases, this raises serious questions about the impartiality of the hearing and reduces the probability of obtaining a satisfactory remedy from the grievance process. The possible exception is a situation in which the individual hearing the grievance is someone who may, for some individual reason, have a high probability of being favorable to the claims being presented by the student or family. Unless the grievance officer is known to the advocate or otherwise has a reputation for such behavior, it probably will not be worth the time delay which could result from resort to a futile grievance procedure. However, the process may be necessary to exhaust administrative remedies prior to seeking judicial resolution of the complaint.[13a]

In situations in which there is little probability of successful informal resolution of the problem, a grievance procedure is even less likely to succeed. Completion of the grievance process is not required for the complainant to have exhausted administrative remedies and so resort to the grievance mechanism is probably needless. However, if informal resolution could occur if an impartial or relatively disinterested third party intervened, then reliance upon the grievance mechanism might expedite matters.

5.2.3 SECTION 504 INSTITUTIONAL SELF-EVALUATIONS

Under Section 504, recipients of federal financial assistance were obligated to perform self-evaluations of their compliance with the statute and regulations by June 3, 1978.[14] This evaluation, undertaken with the assistance and consultation of interested persons including handicapped persons or organizations representing handicapped persons, measured compliance and ways to modify noncompliant behavior to remedy the effects of past discriminatory conduct. Following the self-evaluation, any recipient of federal financial assistance employing fifteen or more persons was required to maintain, for three years following completion of the evaluation, publicly-accessible documentation of the persons who participated in the self-evaluation, the areas examined and any problems found, and a description of any modifications made or remedial steps taken as a result of the self-evaluation.[15]

If an institutional self-evaluation was undertaken, the advocate could use the information about the school system's programs and services to formulate an appropriate program for the student.

5.2.4 FEDERAL ADMINISTRATIVE REMEDIES

Several avenues for administrative redress other than those under Public Law No. 94-142 are available to individual and group complainants. Although these alternatives are not as likely to result in specific and effective relief for an individual student, they may require general corrective action of the educators. Both the processes for pursuing a complaint through federal administrative channels and the nature of the potential relief differ according to the statute under which the complaint is initiated.

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[9] 420 U.S. at 310.

[10] *Id.*

[11] 34 C.F.R. § 104.7.

[12] 34 C.F.R. Part 104, App. A, comment 12.

[13] 20 U.S.C. §§ 1681-1686.

[13a] *See* App. A, § 140F.1 *infra*.

[14] 34 C.F.R. § 104.6(c).

[15] *Id.* § 84.5(c)(iii).

The most common basis for federal administrative review of complaints concerning special education is through Section 504 of the Rehabilitation Act of 1973. Regulations under Section 504 require that all recipients of federal financial assistance to whom Section 504 applies sign an assurance of compliance indicating they will comply with the statute and regulations.[16] One provision requires remedial action if the federal government finds lack of compliance with the statute and regulations.[17] This remedial action, if not voluntary, may be mandated by the federal government.[18]

Under the Section 504 regulations, complaints are processed under the same procedures used for complaints under Title VI of the Civil Rights Act of 1964.[19] The complaint is initiated, through a simple letter[20] to the appropriate regional office of the Office for Civil Rights (OCR), United States Department of Education.[21] A sample complaint letter as well as a list of OCR regional offices are set forth in Appendix 5B. This letter must ordinarily be filed within 180 days of the date of the alleged act of discrimination.[22] Following receipt of the letter of complaint, OCR will initiate an investigation of the school's compliance with Section 504 and its regulations.

The majority of complaints in which OCR finds discrimination will be handled through informal resolution.[23] Only in exceptional circumstances will OCR resort to the remedies set forth in the regulations[24] to achieve compliance. The ultimate remedy for violations of Section 504 is suspension or termination of federal financial assistance to the school or school district.[25] While this avenue may be combined with or superceded by "other means authorized by law," it is clearly designed to enforce the rights of the United States rather than rights of individual or group complainants.[26] In fact, since federal funds are usually used to pay a small portion of the costs of special education programs, the individual student may be harmed by this remedy. Effective individual relief, particularly affirmative relief in the form of damages or an individually tailored remedy, is only a remote possibility for a Section 504 complainant. In addition, individual complainants are not parties in any administrative hearings conducted under Section 504; they may serve in such proceedings only as *amicus curiae* and may receive copies of the proposed hearing decision.[27] The Department of Education is, in effect, both the moving party and the only complaining party in any administrative hearings under Section 504. Those remedies which might be available through an OCR administrative hearing will only be achieved after an administrative hearing.[28]

A Section 504 hearing is conducted by a federal administrative hearings officer without strict adherence to technical rules of evidence and procedure.[29] Upon completion of the hearing,[30] the hearing officer is empowered to make either an initial decision or a proposed decision available to each party. Both the program under review and the Department may file exceptions to an initial decision; in the absence of filed exceptions, an initial decision becomes a final decision unless the Secretary of Education determines that circumstances warrant a review of the decision.[31]

5.3 HEARING RIGHTS UNDER PUBLIC LAW NO. 94-142

5.3.1 NOTICE

Public Law No. 94-142 requires that prior to a hearing, written notice be provided to the parents or guardian of a child setting forth the school's position on the issue about which the hearing has been sought.[32] The notice must contain a full explanation of all procedural rights available to the parents; a description of the proposed or refused action, including an explanation for the school's decision; a description of other options considered, and the reasons why those options were rejected; a description of each evaluation procedure, test, record, or report; and any other factors relied upon by the educational agency.[33]

The notice must be written in understandable language and in the parent's or guardian's native language or other mode or communication (e.g., sign language) unless clearly not feasible to do so. Steps must also be taken to ensure that the parent understands the content of the notice and that the agency maintains records that these requirements have been met.[34]

5.3.2 RIGHT TO COUNSEL

Any party to a hearing has the right to be accompanied and advised by counsel.[35] This does not clearly afford a party the right to representation by counsel, but only the right to advice of counsel. In some jurisdictions, the provision has been interpreted to mean that parties do not have the right to have their case presented by counsel. Under such an interpretation, the parent is required to present his/her own case, using counsel only as an advisor. In other jurisdictions, the "right to counsel" has been erroneously interpreted to mean only a "right to legal counsel" with lay advocates excluded from representing parents and students. The matter has itself become an issue for a due process hearing or an OCR complaint under Section 504.

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[16] *Id.* § 100.6.
[17] *Id.* § 100.8.
[18] *Id.* §§ 100.8-.10.
[19] 42 U.S.C. § 2000d; 34 C.F.R. Parts 100, 101.
[20] *See* App. 5B *infra* (sample letter for initiating a complaint under Section 504).
[21] *See* App. 5C *infra* (address for regional OCR offices).
[22] 34 C.F.R. § 100.7(b).
[23] *Id.* § 100.7(d).
[24] *Id.* § 100.8.
[25] *Id.* § 100.10.
[26] *Id.* § 100.10(f).
[27] *Id.* §§ 101.21, .22.
[28] *Id.* Part 101.
[29] *Id.* §§ 101.71-.85.
[30] *Id.* §§ 101.102-102.106.
[31] *Id.* § 101.106.
[32] 20 U.S.C. § 1415(b)(1)(C).
[33] 20 U.S.C. § 1415(b)(1)(D); 34 C.F.R. § 300.505.
[34] *Id.*
[35] 34 C.F.R. § 300.505.

Both of these restrictions on the right to representation in administrative hearings considerably disadvantage parents and students in a situation where educational officials already have an advantage because of the many personnel, financial, and technical resources available to them. These restrictions impinge considerably on the ability of a student to obtain a fair hearing, particularly if educational officials are represented by legal counsel. Additional provisions, such as that affording the right to confrontation and cross-examination,[36] are rendered virtually meaningless if the student's chosen representative is denied a significant role in the hearing. While the "right to counsel" in these hearings may not include the right to counsel at public expense, the right should be broadly interpreted. In those jurisdictions where the right is being abridged, pressure for favorable state regulations as well as complaints to federal Department of Education officials are appropriate.

The right to counsel is enforced somewhat by a regulatory mandate requiring that the public agency inform the parent of any "free or low-cost legal or other relevant services available" at any time the parent requests the information or when a parent initiates a hearing.[37] Parties to administrative hearings can also be accompanied and advised "by individuals with special knowledge or training with respect to the problems of handicapped children."[38] For the parent or advocate forced to deal with complicated educational and diagnostic information, the right to expert assistance at the hearing may be invaluable. Under this provision an expert witness, at the parent's request, may be in attendance throughout the hearing, not merely when (s)he is testifying, to serve as an advisor to the family and/or advocate. This type of advisory assistance is particularly useful to offset the advantage school officials have because of their access to the advice of a broad range of special personnel on the staff of the school district.

5.3.3 RIGHT TO AN IMPARTIAL HEARING

The hearing must be conducted by either the state educational agency or the public agency directly responsible for the education of the child, as determined by state law or policy,[39] yet the hearing officer must be impartial.[40] According to the regulation, the impartiality requirement mandates that the hearing officer should not be an employee of a public agency involved in the care or education of the child or a person who has a personal or professional interest which would conflict with his/her objectivity.[41] Impartiality is not lost, according to the regulation, in a case when someone is employed by an agency solely as a hearing officer.[42]

However, the right to an impartial hearing officer has been circumvented in many special education administrative hearings through a number of subtle and not-so-subtle devices. In many states, the "hearing officer" for all issues involving education, not just special education, was the local school board, or a subcommittee of it. While the use of the school board as a hearing panel might appear to meet the mandate of 20 U.S.C. § 1415(b) (2), namely, that the hearing be "conducted by . . . the local educational agency," the impartiality of the school board may be challenged on the grounds that the members have "a personal or professional interest" in the outcome of the hearing, a conflict prohibited by the regulations. School board members frequently rely heavily on the recommendations of their school administrators for their decisions, considerably diminishing a student's or parent's chance of successfully challenging school action. In addition, school board members are responsible for overseeing school expenditures, a duty which may influence approval of an expensive private placement. A "policy interpretation" under Section 504 issued by the United States Office for Civil Rights indicates that "school board members may not serve as hearing officers in proceedings to resolve disputes between parents of handicapped children and officials of their school system."[43] This policy interpretation, like all such federal documents, does not have the legal weight of a statute or regulation but is a binding interpretation of the law within the Department of Education itself.

Aside from school board members, there are other "hearing officers" whose impartiality is questionable. Many states rely upon their highest ranking educational official, the state commissioner or secretary of education, as the final administrative decisionmaker for special education appeals. Regardless of whether this official is elected, appointed, or on the payroll of the state's education department, the state board, or the governor, (s)he is not sufficiently impartial; (s)he has a professional interest in special education in the state since, under the federal statute and regulations, (s)he is responsible for ensuring implementation of and compliance with Public Law No. 94-142. In fact, (s)he may be required to provide direct educational services if a local agency is unable or unwilling to do so.[44]

Several state departments of education, including Massachusetts and California, have established divisions of special education appeals within the department. These organizations employ individuals full-time exclusively as hearing officers for all administrative hearings in the state. Because their sole function is as hearing officers, they are not prohibited from serving in this impartial capacity merely because they are paid by the state educational agency.[45] Despite the obvious questions about the impartiality of these state employees, these hearing officers have been generally satisfactory. The advocate, however, should investigate the impartiality of the hearing officers individually. Regardless of whether parties to a hearing are allowed to select a hearing officer from a proposed panel, as in some states, or are assigned a hearing officer, a challenge on the grounds of partiality can be raised. Each public agency is required to maintain a list of persons who serve as hearing officers; this list must include a statement of qualifications of each person on the list.[46] The information on this list, including that from other advocates, can be used to determine the necessity for an impartiality challenge.

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[36] 20 U.S.C. § 1415(d); 34 C.F.R. § 300.508(a)(2).
[37] 34 C.F.R. § 300.506(c).
[38] 20 U.S.C. § 1415(d); 34 C.F.R. § 300.508(a)(1).
[39] 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.506(a).
[40] 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.507.
[41] 34 C.F.R. § 300.507(a).
[42] *Id.* § 300.507(b).

[43] Policy Interpretation No. 6, Section 504 of the Rehabilitation Act of 1973, 43 Fed. Reg. 36,036 (1978).
[44] 20 U.S.C. §§ 1412(1), 1413(a)(2), 1413(a)(4), 1413(a)(11), 1413(b), 45 C.F.R. § 121a.360.
[45] *See* 45 C.F.R. § 121a.507(a)(1), (b).

Consideration of the impartiality of a potential hearing officer might include scrutiny of one or more of the following factors:

- If the state publishes the decisions of hearing officers, does a review of the decisions of the particular officer indicate a pattern which is favorable to students or at least evenly divided between students and educational officials?
- To what extent has the individual been employed by educational agencies and what is the nature of this involvement? Has the person served so frequently, for example, as a consultant on special education programming for local school districts that a sizable portion of his/her income comes from this source?
- Is the individual's professional training in law, education, or some other field? A potential hearing officer trained as a deaf educator who uses a sign communication approach only might be disqualified if the sole issue at the hearing is whether the student should be placed in a "total communication" training program for the deaf as opposed to a program which trains exclusively in sign.
- Is the individual an employee of another educational agency within the state? Several states use employees of one school district to conduct hearings in another school district. Often, the commonality of interests and sense of colleagueship among educators are so strong that an employee of one school district may not be sufficiently neutral about issues.

Aside from the qualifications of the hearing officer, other factors may affect the fairness and neutrality of the hearing. Has the hearing officer heard so much about the case prior to the hearing that (s)he should be disqualified on the same grounds that a potential juror might be disqualified for in a criminal trial that had attracted pretrial publicity? Has the hearing officer engaged in *ex parte* communications? Does the hearing officer know any of the parties or key witnesses?

5.3.4 EXPERT WITNESSES

Administrative hearings about evaluation, identification, placement, and programming will often be decided on the testimony of expert witnesses. The parent's expert witness is also frequently relied upon to conduct an independent evaluation, to advise the family and the advocate on educational issues and alternatives, to review program implementation and success, or to mediate differences with educational officials. Selection and preparation of the expert is, therefore, of critical importance.

Location of the right expert witness is very difficult in many places. In rural areas with small or isolated populations it is especially troublesome to find an expert. In most places, there are several options to consider. Many psychologists, including educational psychologists, are in private practice, as are psychiatrists, neurologists, and physical therapists. Some audiologists, speech therapists, and learning specialists are also private practitioners. Private or publicly funded community health or mental health centers may have staff specialists. Public or private universities, particularly those with schools of education or teaching hospitals, may be resources.[47]

When an expert witness is to testify on behalf of the student at an administrative hearing, several factors in the selection of the expert are relevant:

- What is the professional training of the expert? If the student is emotionally disturbed, but only the nature of the disability is at issue, a psychiatrist or clinical psychologist might be necessary. If, however, the student's emotional problems consist primarily of a fear of being in school ("school phobia"), then an individual trained as a school psychologist might be appropriate.
- Has the expert been licensed or certified by the appropriate professional agency? Although most state departments of education issue certificates to school psychologists, many individuals who claim to be school psychologists are not certified by the state in which they work.
- Does the expert have practical experience working with children or teaching in the elementary and secondary schools? Many experts have impeccable academic training but little or no experience in the day-to-day difficulties of teaching elementary or secondary students. The testimony of these individuals, particularly when it concerns a school program or school discipline, is often discounted by hearing officers.
- Does the expert have the ability to communicate effectively with the hearing officer? If the case is expected to proceed to higher levels of administrative hearings or reviews, will the testimony of the expert look as good in a hearing transcript as it sounds on the witness stand?
- Will the expert serve as an effective "translator" of educational terminology? One of the major functions of the expert may be to explain clearly to the hearing officer the meaning of psychological and educational terms used in school records or in other testimony presented during the hearing. Often, if the student's expert is put on the stand early and used to define educational terms for a hearing officer not familiar with the terminology, the

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[46] 45 C.F.R. § 5121a.507(c).

[47] *See* § 3.2 *supra* (suggestions of possible sources for evaluation information).

information will be gratefully received by the hearing officer.

- Is the expert sufficiently independent from the state or local educational system so that (s)he can be relied upon and trusted? Many times, the only experts who are readily available are professors in the state colleges or university schools of education. Often these individuals have interests closely aligned to those of the other side because they are also employees of the state board or department of education. They may serve as paid private consultants to the state or local school district, or they may have trained most of the professional educators in the state. Ask the expert if (s)he has any conflict of interest.
- Is the expert motivated to serve as an advocate for the student and his/her needs? Students are not aided by their expert witnesses when the expert is more interested in promoting or protecting his/her academic reputation than in aiding the student.
- Has the expert served as an expert witness previously? If so, will this experience be advantageous or is there a chance that (s)he will be negatively perceived as a "professional witness"?
- Will the personality and appearance of the expert harm or help the case? Different hearing officers react differently to witnesses, and a decision about this matter generally is aided by some knowledge of the hearing officer's biases. In general, a pleasing personality and conservative dress are desirable. For example, a potential expert who was to be used in a conservative rural state had an excellent vita and sounded very promising in telephone interviews but was dismissed as a possible candidate when the advocate met him and discovered he had a long ponytail and continuously chewed tobacco.
- Does the potential expert have sufficient time to prepare his/her testimony? Thorough preparation, through both consultation with the advocate and review of relevant documents, is essential. An unprepared expert may hurt, rather than help, the case.
- Will the expert actually examine, work with, and come to know the student? Or, if the expert's testimony will be based solely on a review of the student's records, is (s)he able to explain convincingly how an opinion can be formulated on the basis of a review of the records alone?
- Has the expert ever published books or articles or made public statements on the issues about which (s)he will be asked to testify? If so, do any of these statements conflict with what the expert plans to say in the case?
- Does knowledge of and conversations with the expert, including face-to-face conversations, lead one to believe the expert will be able to perform comfortably and persuasively on behalf of the client? Will the expert be able to establish sufficient proof for the case and convince the decisionmaker to rule favorably?

All of these factors about the expert witness should also be taken into account in determining the credibility, strengths, and weaknesses of both expert and nonexpert witnesses for the other side.

After selecting an appropriate expert witness, the advocate should compile the expert's current vita or resume, if not already available. This document should emphasize the strengths of the expert which are particularly relevant to the case. Present this document as the first exhibit when the expert is put on the stand and is establishing his/her credentials. Impressing upon the hearing officer the nature of the individual's expertise is the critical foundation for all of the testimony which the expert will offer. It is important that the advocate's preparation of the witness focus on the issues of the particular case and elicit only relevant testimony.

The advocate should be firm about what is expected from the expert. The questions to be asked and the expert's responses should be reviewed thoroughly before the hearing. Every expert witness has a fear that (s)he may be humiliated on the stand because there was some vital piece of evidence that (s)he was not informed about. It is, therefore, best to provide the expert with all the information available about the case, both favorable and unfavorable. Providing all available information to the expert will give the expert the necessary foundation to assist in predicting how the case will be presented by the other side, to help formulate questions to ask witnesses of both sides, to determine the need for further information to strengthen the case, and to help in developing a thorough understanding of the strengths and weaknesses of the case.

5.3.5 PREPARING FOR AN ADMINISTRATIVE HEARING

Regardless of the issues to be addressed in an administrative hearing, the qualifications of the hearing officer, or whether the hearing decision is only an intermediate administrative determination, the following guidelines apply:

- *Preparation*. Too much preparation for a hearing is not possible. The purposes and goals of the hearing should be defined before preparing for the hearing.
- *Evidence*. Carefully marshall all testimony and exhibits so that they will move toward the ultimate goal. Review all parts of all exhibits to determine whether they help or harm the case. Organize and number exhibits in a logical sequence just as if preparing for a trial. Create additional summary or explanatory exhibits, including audio-visual aids such as charts, slides, posters, etc., if they will clarify the presentation.
- *Foundations*. Lay the proper foundation for all exhibits and testimony presented. This foundation must be sufficient to meet the requirements of whichever rules of evidence apply and must also include definitions of educational terminology if unfamiliar to the hearing officer.
- *Rules of evidence*. Formal federal or state rules of evidence are not often used in special

education administrative hearings. Usually, the rules are informal with very broad rules of admissibility. In any event, it is well to have the hearing officer clarify the rules of evidence prior to the hearing.

- *Questions*. Questions to witnesses on both sides should be direct, clear, concise, and posed in a logical sequence. Generally, hypothetical questions should be avoided, particularly in questioning one's own witnesses. In cross-examination, direct hostility should be avoided. Leading questions are often useful. A cautious approach to cross-examination also dictates to never ask a question of the other side unless the answer is reasonably certain and will help the case.
- *Witnesses*. The witnesses, particularly educational evaluators, specialists in the education of handicapped students, and others with a high degree of technical expertise, are of critical importance in special education administrative hearings. The examination and cross-examination of such witnesses is frequently one of the more difficult tasks confronting the special education advocate. However, proper preparation can prevent many of the problems which might arise in examining or cross-examining such witnesses. Carefully prepare all the witnesses both on the substance of the testimony and on the events which will occur at the hearing. A relaxed witness is important. Describe in detail for the witness how the hearing will be conducted, what the room will look like, what kinds of treatment to expect from the other side. If possible, the witness should sit in the hearing and observe for some time before (s)he is called to testify.[48]
- *The Client as witness*. Consider very carefully whether to call the parent and/or the student as a witness. Calling a parent or student at the proper moment may emphasize for the hearing officer the importance of the "human side" of the case. If the case involves issues concerning the ability of a student to function in the regular class setting, the student may demonstrate his or her capabilities. On the other hand, some students or parents may harm the case, even as observers, and should be kept away from the hearing room.
- *Stipulations*. The hearing will be expedited if both sides stipulate prior to the hearing all facts not in dispute.
- *Burdens*. Receive clarification from the hearing officer about the allocation of the burdens prior to the hearing. Find out who has the burdens of proof, *i.e.*, the burden of proceeding first and the burden of persuasion.
- *Record*. Will any record of the hearing be maintained and, if so, will the record consist of a tape recording or a court reporter's transcript? If a record is kept and a copy is needed, what, if any, will be the expense?[49] If a record is not kept, the advocate may wish to compile one by bringing a tape recorder or court reporter if a record might assist in further administrative proceedings or judicial review of the case.
- *Privacy*. Determine whether the hearing should be conducted publicly or in closed session.[50] A major consideration is whether an open hearing will have an adverse impact on the client, fostering stigmatization and ridicule of the student because of his/her educational difficulties. A subsidiary issue is whether the advocate and the student's parents think it is advisable for the student to attend the hearing.[51] Can the student be adequately prepared prior to the hearing to understand and accept the things which will be said about him/her? In any case, but particularly if the student will attend, take the time to explain thoroughly what is occurring and to answer any questions.

5.4 JUDICIAL REVIEW UNDER PUBLIC LAW NO. 94-142

When a complaint about the provision of a free, appropriate public education has not been resolved satisfactorily, the family is entitled to obtain judicial review of the matter.[52] A complaint may be filed in either a state or a federal district court. If the case is filed in a federal court, that court shall not be barred from jurisidiction by the amount of money in controversy.[53]

When a complaint under Public Law No. 94-142 is brought to court, the court receives the records of all administrative proceedings but can also hear additional evidence at the request of any party.[54] Any decision reached by a court must be based on a preponderance of the evidence.

Once a court reaches a decision, it may enter any form of relief it considers appropriate.[55] Because the statute allows a wide range of complaints concerning any matter relating to identification, evaluation, educational placement, or the provision of a free, appropriate public education,[56] the scope of issues in which a court might become involved and the relief that might be ordered is very broad.

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[48] *See* § 5.3.4 *supra* (suggestions concerning the use of expert witnesses). The hearing officer may be prohibited from sequestering witnesses. *See* 45 C.F.R. § 121a.508(a)(1).

[49] The regulations under Pub. L. No. 94-142 indicate that parents have a right to obtain a written or electronic verbatim record of the hearing. 45 C.F.R. § 121a.508(2)(4). However, the regulations do not clearly specify that this record should be provided at public expense. It may be possible to argue successfully that the record of a hearing concerning the special education of a student is part of the student's school record and that, under the Buckley Amendment (20 U.S.C. § 1632g), students are entitled to a copy at a fee, but only if the fee imposed does not effectively prevent inspection and review of the record. *See* 45 C.F.R. § 99.8; § 3.3 *supra* (student records access).

[50] There is a right to an open hearing if the parents desire one. 45 C.F.R. § 121a.508(b)(2).

[51] It is the parent's right to have the student attend the hearing. 45 C.F.R. § 121a.508(b)(1).

[52] 20 U.S.C. § 1415(e).

[53] *Id.* §§ 1415(e)(2), (4).

[54] *Id.* § 1415(e)(2).

[55] *Id.*

[56] *Id.* § 1415(b)(1)(E).

On special feature of judicial involvement in complaints brought under Public Law No. 94-142 is a statutory provision requiring that, unless the state or local educational agency and the parents agree otherwise, the student is to be maintained in the placement in which (s)he was located when the complaint was filed.[57] For a student seeking initial admission to a public school, the student is to be placed in a public school program, if the parents consent, until the complaint is resolved.[58]

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[57] *Id.* § 1415(e)(3).

[58] *Id.*

APPENDIX 5A
SAMPLE *WOOD* v. *STRICKLAND* LETTER

Superintendent of Schools
Washington School District
P.O. Box 0001
Jonesboro, MA 11112

Dear Superintendent:

My client, Jane Doe, received a phone call today informing her that Johnny, her son, could no longer be provided school transportation services, and that the Board of Education will, at its next meeting, consider your recommendation to terminate school bus transportation services to other students enrolled in the special program of Hogan School.

As your district records indicate, Johnny Doe is a ten-year-old Hogan School student who has been enrolled in a special education program in your school system for the past four years. Given his status as a handicapped student receiving special education, Johnny is entitled to the protection of state (State Code. Ch. ______) and federal law (P.L. 94-142, 20 U.S.C. §§ 1401-1416, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794).

Under federal law **(the advocate may also wish to add a discussion of state law provisions here, if they are applicable),** school districts are required to provide special education and related services to handicapped children in need of such services (20 U.S.C. §§ 1401 (18), § 1415(b)(1)(A); 34 C.F.R. §§ 300.300-300.307). Handicapped children are entitled to receive supportive services as part of their entitlement to a free, appropriate public education. As part of this entitlement, handicapped students are entitled to transportion services when such services are necessary to ensure the provision of appropriate education (20 U.S.C. § 1401 (17); 34 C.F.R. § 300.13).

Therefore, any decision by you, your staff, or the Board of Education to terminate transportation services to Johnny Doe or any other handicapped students in need of special education at Hogan School abridges those students' rights under federal law. Should such an event occur, the school district and the individual educational officials participating in the decision would be involved in a clear violation of established statutory and constitutional rights. According to the United States Supreme Court in such situations, students may be entitled to recover monetary damages from educational officials. These damages would be recoverable against such officials personally and individually (*Wood* v. *Strickland*, 95 S.Ct. 992 (1975)).

I am certain that neither you nor any other school official in the District would care to abrogate the educational rights of handicapped students. I request, on behalf of my clients, that transportation services to Johnny Doe be reinstated as of 7:00 a.m. next Monday morning. In addition, I request that you withdraw your proposal that the Board eliminate transportation services for the special program at Hogan School and that you confirm, in letter to me by Monday morning, that you are withdrawing such a proposal.

Until such time as services are restored and I receive a timely and favorable response from you on your proposal to the Board, you may deem this letter to be a formal complaint of denial of appropriate services to Johnny Doe (20 U.S.C. § 1415 (b)(2); 34 C.F.R. § 300.506, § 300.504(a). Full administrative and judicial remedies for this problem will be pursued on behalf of my clients.

I look forward to hearing from you soon.

Sincerely yours,

Antoinette Attorney
Neighborhood Legal Services

cc:Members of the Board of Education
Ms. Jane Doe

APPENDIX 5B
MODEL COMPLAINT LETTER UNDER SECTION 504

Director, Regional Offiice for Civil Rights
Region I
U.S. Department of Education
Boston, MA 02111

Dear Director:

I am hereby filing a complaint of discrimination on the basis of handicap against Sunny School District, Sunnydale, Massachusetts. This discrimination violates § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulations.

The Sunny School District has determined that as of March 1, 1980, it will no longer provide bus transportation services to handicapped students enrolled in the elementary special education program in the District's Hogan School. The District previously provided this transportation to all handicapped students for whom an IEP team had determined such transportation was appropriate. Approximately thirty-five elementary students were transported to Hogan School under the old policy. If the new policy is implemented, all will be denied busing. For a majority of these students, such transportation is essential and the termination of transportation services will have the effect of excluding the students from school.

I hereby request an immediate investigation of this complaint and notification of the dates the investigation is to take place. I also request copies of all written preliminary findings of the investigation and a record of the specific facts upon which such findings are based and a copy of all of your agency's correspondence with the Sunny School District pertaining to your determination whether a violation has occurred.

Sincerely yours,

Antoinette Attorney
Neighborhood Legal Services

APPENDIX 5C
REGIONAL OCR OFFICES

Office for Civil Rights
U.S. Department of Education
140 Federal St., 14th Floor
Boston, MA 02110
(617) 223-4405

Office for Civil Rights
U.S. Department of Education
Federal Building
26 Federal Plaza, Room 3908
New York, NY 10007
(212) 264-4633

Office for Civil Rights
U.S. Department of Education
P.O. Box 13716
3535 Market St.
Philadelphia, PA 19101
(215) 596-6772

Office for Civil Rights
U.S. Department of Education
101 Marietta St.
Atlanta, GA 30323
(404) 221-2954

Office for Civil Rights
U.S. Department of Education
300 South Wacker Dr., 8th Floor
Chicago, IL 60606
(312) 353-2521

Office for Civil Rights
U.S. Department of Education
1200 Main Tower Building, 19th Floor
Dallas, TX 75202
(214) 767-3951

Office for Civil Rights
U.S. Department of Education
12 Grand Building
1150 Grand Ave.
Kansas City, MO 64106
(816) 374-2474

Office for Civil Rights
U.S. Department of Education
Federal Building, Room 11037
1961 Stout St.
Denver, CO 80294
(303) 837-2025

Office for Civil Rights
U.S. Department of Education
100 Van Ness, 14th Floor
San Francisco, CA 94102
(415) 556-8586

Office for Civil Rights
U.S. Department of Education
1321 Second Ave.
Room 5041, M/S 508
Seattle, WA 98101
(206) 442-0473

Glossary of Educational Terms

This glossary contains some of the terms most commonly used in the special education context. These terms and their definitions are reprinted with permission from *The Dictionary of Education*, Carter V. Good, Ed. (McGraw-Hill Book Company, 1973, Third Edition). The *Dictionary* is a useful resource for individuals who are not familiar with educational terminology.

a

abasia: inability to walk due to motor incoordination (often resulting form psychogenic disturbances) or to paralysis.

abasia, atactic: incoordination in walking resulting from *ataxia;* also called *ataxic abasia.*

achiever, latent: a person who possesses hidden ability to succeed in specified areas but who has not yet reached the culmination stage of this process, possibly because of developmental or motivational factors.

acoumeter: an instrument used for testing the hearing, for example, the Politzer acoumeter, which produces a fixed clicking tone and which normally can be heard at distances up to about 45 feet.

acoustic method: a method of teaching the deaf to understand speech and to speak through training of the auditory and tactile sense organs by sound vibrations produced by the voice or sonorous instruments; devised by Dr. Max A. Goldstein.

acuity, auditory: ability of an individual to discriminate between two auditory stimuli in terms of intensity, pitch, timbre, or duration.

acuity, sensory: the power of perceiving stimuli of low intensity or brief duration, or of distinguishing among them, as measured by the stimulus threshold or the differential threshold.

adjustment, binocular: (1) the act of directing the two eyes so that they work harmoniously in producing clear images upon the retinas which are interpreted as a single clear, sharp image; (2) the state in which the two eyes work together to produce clear, sharp vision.

affect: *n.* the feeling component of mental life as contrasted with the cognitive, or thinking, elements of mental activity.

age, basal: a term used with the Stanford-Binet intelligence test, representing the age level assigned to the most advanced section of the test for which the subject answers all items correctly; used together with the additional months of credit earned at higher age levels to estimate the *mental age* of the child.

age equivalent: the corresponding age score for a raw score on a test, established by determining the average score made by pupils of the same age; an age norm.

agnosia: a condition of losing the ability to recognize the character of objects through the senses of touch, taste, sight, or hearing.

agrammatism: (1) failure to utter words in their grammatically correct order; (2) a symptom in motor (expressive) aphasia characterized by omission of connectives and related words, resulting in telegraphic sentences.

agraphia: an inability to express thoughts in writing due to a lesion of the central nervous system; often associated with the *aphasias. Comp. w.* **dysgraphia.**

alalia: (1) delayed development of speech in childhood; (2) absence of speech due to psychogenic causes. *Comp. w.* **aphasia; aphonia.**

alexia: a type of aphasia resulting from lesions in any one of a variety of locations from the occipital to the frontal lobe of the brain, causing a loss of motor patterns which interferes with the patient's ability to organize abstract visual symbols of written language into meaningful terms, resulting in inability to read; sometimes called *word blindness.*

alogia: absence of speech in association with severe mental retardation (idiots, imbeciles).

amaurosis: (1) blindness resulting from a defect of the optic nerve; (2) absolute blindness, from whatever cause.

ambieyedness: a condition characterized by a lack of dominance of either eye. (Applied to eyedness as *ambidexterity* is used with respect to handedness.)

amblyopia: (1) weakness of vision, without any apparent change in the structure of the eye itself; (2) weakness or loss of vision in which no pathological condition can be discerned in the eye. (Often qualified as congenital amblyopia, hysterical amblyopia, or tonic amblyopia.)

amblyopia ex anopsia: (1) weakness of vision resulting from functional disuse of the eyes; (2) partial loss of vision due to a positive act of inhibition or suppression, a defense mechanism that operates to prevent diplopia, as in squint.

aphasia: a disorder consisting essentially in an inability to produce or to comprehend language; may involve both spoken and written language; more specifically, loss of the significance of the symbol; the main types are nominal, syntactical, verbal, and semantic, according to Head, or expressive, receptive, and expressive-receptive, according to Weisenburg and McBride; believed to be caused by various lesions (traumatic, vascular, inflammatory, etc.) of the brain, particularly in the region of the inferior frontal gyrus (Broca's area) and in association areas of the dominant hemisphere.

aphasia, acquired: the loss of ability to comprehend, manipulate, or express words in speech, writing, or signs; acquired after birth due to some injury or disease in the brain centers controlling such processes.

aphasia, auditory: defect, loss, or nondevelopment of the ability to comprehend spoken words, due to disease, injury, or maldevelopment of the hearing centers of the brain; also called *word deafness.*

aphasia, motor-expressive: loss of ability of expression, although the words may be recognized if seen in print; commonly associated with a lesion of the inferior frontal gyrus (Broca's area) of the dominant hemisphere; also called *expressive aphasia. See* **aphasia.**

aphasia, sensory-receptive: interference with adequate comprehension of spoken or written words, often as a result of a lesion of the temporal lobe in the dominant hemisphere; also called *receptive aphasia. See* **aphasia.**

aphonia: loss of voice due to peripheral lesion, which may be structural (trauma, tumor), neurological (recurrent laryngeal nerve), or psychogenic.

apraxia: loss of ability to perform voluntarily various purposive movements in the absence of paralysis, ataxia, or disturbances in sensation; there are several types — motor, ideomotor, ideational, etc., examples of which are loss of manipulative patterns, such as inability to relate the word symbol to the motor symbol for writing and disabilities in use of organs of articulation for speech.

apraxia, verbal: the inability to produce words vocally in a patterned, sequential, meaningful manner.

aprosexia: a condition characterized by difficulty in fixing the attention.

articulation: (speech) the production of the sounds of speech by a modification of the stream of voiced or unvoiced breath, principally through the movements of the jaws, lips, tongue, and soft palate.

articulatory defect: any defective manner of utterance of speech sounds, either separately or in connected speech; usually a relatively constant condition, the most frequently found such defects being sound substitutions, sound distortions, sound omissions, foreign dialect, oral inaccuracy, and lisping; not to be confused with mispronunciation or voice defect. *Dist. f.* **stuttering.**

astigmatism: a refractive error in which light rays are not brought to a single focus because of a difference in the degree of refraction in the different meridians of the eye; results from irregular curvature of cornea or lens.

ataxia: (1) motor incoordination manifest during purposive movement by irregularity and lack of precision; (2) a type of muscular incoordination characterized by lack of balance and/or directional control; one of the types of cerebral palsy; *see* **athetosis; cerebral palsy; spasticity.**

ataxia, static: (1) loss of deep sensibility causing inability to preserve equilibrium in standing; (2) a form of ataxia in which an individual tries to maintain a fixed position or posture.

athetoid: descriptive of a patient afflicted with a disorder characterized by slow, squirming, twisting, purposeless movements. *See* **athetosis.**

athetoid, tension: one afflicted with *athetosis* who voluntarily tenses his muscles in an endeavor to stop the involuntary movements.

athetosis: a neuromuscular disability found in the cerebral palsied; characterized by uncontrolled movements; caused by injury to the basal ganglia of the midbrain, which accounts for about 40 percent of all cerebral palsies. *See* **athetoid.**

audiogram: a graphic recording of *audiometric test* results; shows any hearing loss in decibels for pure tones as a function of frequency.

audiogram, threshold: a graph that shows hearing level as a function of frequency.

audiology: that interdisciplinary professional area encompassing, among others, the fields of biology, education, medicine, speech, psychology, and physics, that has to do with the measurement and treatment of impaired hearing.

audiometer: an instrument for measuring and testing auditory acuity; measurements may be made with tone or speech signals.

audiometrist: a person trained to administer audiometric tests.

aura: a distinctive, subjective experience occurring in persons with epilepsy shortly before the advent of an epileptic seizure.

autism: (1) a mental condition marked by a disposition to turn away from reality, to dwell upon imaginary scenes and events, and to gain satisfaction from wishful thinking; (2) a type of thinking dominated by the thinker's personal desires and relatively unchecked by any need to make it conform with reality.

b

battery, achievement: a group of achievement tests standardized on the same population and thus yielding comparable scores; frequently the tests are designed for measuring outcomes in most of the major instructional areas of specified grade levels; sometimes loosely applied to any group of tests administered to a given set of individuals, even though the tests were not standardized on the same population.

battery, differential aptitude: a group of tests designed with the intention of showing an individual's relative chances of success in each of a variety of different activities; such batteries are usually developed with the assistance of *factor analysis.*

battery of tests: (1) a group of several tests intended to be administered in succession to the same subject or group of subjects; usually the tests are designed to accomplish a closely related set of measurement objectives; (2) a number of specially selected tests employed together to predict a single criterion. *See* **battery, achievement.**

behavior, adaptive: originally, change in structure or behavior that has survival value; now, more generally, any beneficial changes to meet environmental demand; settling down to the conditions for work or learning, with the elimination of unnecessary preparatory behavior.

behavior, apopathetic: behavior that is not overtly directed toward others but is influenced or modified by their presence, for example, the behavior of a person "showing off" before others.

behavior modification: techniques for dealing with maladaptive behavior either through *classical conditioning* (for example, avoiding anxiety in a specified situation by conditioning a response incompatible with anxiety) or through *operant conditioning* (as by arranging and managing reinforcement contingencies so that desired behaviors are increased in frequency and maintained and undesired behaviors are decreased in frequency and/or removed) when used with the nonfunctioning or disruptive school child, behavior changes are measurable by continuous assessment and graphic means; *behavior management,* through using many of the same techniques, is a less precise method.

behavior, operant: behavior for which the specific eliciting stimulus is not determined, for which there is no observed antecedent, or which cannot be described adequately in terms of the simple stimulus-response formula.

behavior, patterning of: exercises and guided bodily movements such as crawling and alternate flexion of leg and arm used as a general remedial activity for children with developmental or learning disabilities on the assumption that such children somehow missed various motor learnings in infancy.

behavior, perceptual-motor: the total activity of the child in which input (sensory or perceptual) is directly related to output (motor or muscular control); also called perceptual-movement behavior.

binocular rivalry: failure to achieve binocular fusion, with a consequent alternation of the images seen by the two eyes when different stimuli (such as two different colors or objects) are simultaneously presented to the two eyes.

blind, educationally: lacking sufficient vision to benefit from instruction by ordinary visual methods. (The border line is commonly regarded as 20/200 Snellen measurement.)

blindness, adventitious: a condition of serious visual impairment occurring after birth as a result of trauma from accident or illness.

blindness, congenital: a general term for blindness acquired at or before birth. *Dist. f.* **blindness, adventitious.**

blindness, legal: as defined by the Social Security Act of 1935, central visual acuity of 20/200 or less in the better eye with correcting glasses or central visual acuity of more than 20/200 if there is a field defect in which peripheral field has contracted to such an angle that the widest diameter of visual field subtends an angle no greater than 20 degrees; the definition varies among the states.

blindness, night: an imperfection of vision, congenital or acquired in which the sight is deficient at night or under poor illumination; may indicate the presence of serious ocular disease, especially retinitis pigmentosa, or of diminished ocular nutrition, due chiefly to vitamin A deficiency.

blindness, psychic: loss of conscious visual sensation owing to the influence of some psychological mechanism such as hysteria rather than as the result of any known physical cause.

blindness, vocational: impairment of vision to such a degree as to make it impossible for a person to do work at which he had previously earned a living.

bone-conduction vibrator: a device on an *audiometer* that delivers vibrations to the mastoid process of the temporal bone instead of generating sound waves in an earphone.

braille: a touch system of reading and writing for the blind, adapted from the older system of Barbier by Louis Braille (1809-1852), in which the letters of the alphabet are represented by various combinations of raised dots in a cell two dots wide by three dots high; may be written by hand with a stylus and slate or on a mechanical braille writer, or may be printed from metal plates.

brain injury: any damage to or destruction of the tissues of the brain; any damage leading to impairment of the function of the brain.

brain lesion: a localized macroscopic damage to the brain; destruction of brain tissue.

C

cerebellum: a part of the brain behind and below the cerebrum and occupying the back part of the skull; concerned with the coordination of movements.

cerebral dominance: the normal condition in which one hemisphere of the brain dominates or leads the other in initiating or controlling bodily movements, this dominance normally residing in the left hemisphere in righthanded persons and in the right hemisphere in lefthanded persons.

cerebral palsy: a neurological condition caused by a defect, lesion, or maldevelopment of the central nervous system which may be congenital or acquired; incoordination, paralysis, weakness, and/or tremor ensue due to a pathological condition in the motor control centers of the brain; sensory, mental, and emotional disorders, singly or in combination, may accompany the motor dysfunction; the major diagnostic classifications are spasticity, athetosis, rigidity, tremor, ataxia, and mixed types. *See* **ataxia; athetosis; spasticity.**

cerebral spastic paralysis: a type of *cerebral palsy* by which the affected person's muscles contract involuntarily and to such an extent that orthopedic deformities may result. *See* **spasticity.**

cerebrum: the main portion of the brain occupying the upper part of the cranium; consists of two equal portions, called hemispheres, which are united at the bottom by a mass of white matter called the corpus callosum.

classroom, self-contained: a classroom in the form of school organization in which classes are composed of groups of children which remain in one location, with one teacher (or team of teachers), for all or nearly all instructional activities; to be distinguished from a departmentalized classroom.

classroom, special: (1) a room used for classes in the special subjects, such as music, homemaking, or physical education; (2) (spec. ed.) a specialized classroom environment providing individualized learning opportunity; grouping is usually done by handicapping characteristics; students may attend on a full- or part-time basis.

classroom, special-education: a room used to instruct groups of children with abnormal physical, mental, or social characteristics.

clinic, psychiatric: a type of behavior clinic concerned with diagnosis and treatment of mental or personality disorders with emphasis on psychiatric methods and usually directed by a psychiatrist; may or may not employ the services of other professional groups.

clinic, psychoeducational: a type of behavior clinic, operated under educational auspices, that is concerned primarily with behavior problems of schoolchildren, especially as these are related to their general adjustment to the school environment, including academic, personal, and social adjustments, with special emphasis on adjustment of school tasks to individual abilities and needs.

clinic, psychological: an organization of psychologists engaging in diagnosis and treatment of personality, behavior, or learning disorders; may use a variety of diagnostic procedures and treatment strategies.

clinic, speech: an agency providing examination, diagnosis, and treatment for speech defects; frequently includes audiometric evaluations; generally operated in conjunction with schools, colleges or universities, and hospitals.

clinical teacher: (spec. ed.) a teacher whose major function is to instruct pupils in an individual or small-group setting rather than in a regular-sized classroom, focusing instruction on specifically diagnosed learning needs of the pupils.

coefficient, confidence: a statement of the confidence with which a statistically based statement may be made, equal to 1.00 minus the confidence level; thus, if the probability that a parameter is beyond certain limits (confidence limits) is .05 (confidence level), the confidence coefficient that the parameter is within the limits is 1.00-.05, or .95.

coefficient, correlation: a pure number, varying usually from + 1 through 0 to − 1, that denotes the degree of relationship existing between two (or more) series of observations.

coefficient of brightness (CB): a rarely used measure of mental ability, obtained by dividing a pupil's score on a given mental test by the score that is normal for pupils of his age; thus, a CB of 1.00 would indicate average brightness, corresponding to an intelligence quotient (IQ) of 100; however, while a CB of more than 1.00 indicates superior intelligence and a CB of less than 1.00 indicates inferior intelligence, these measures are not comparable with IQ's.

coefficient of equivalence: a coefficient of reliability of the type based on a correlation between scores from two forms of the same test or evaluation instrument given at essentially the same time. *See* **coefficient of reliability; reliability.**

coefficient of intelligence (CI): *syn.* **coefficient brightness.**

coefficient of regression: (1) (with two variables) an expression of the slope of the regression line; the average number of units of change (increase or decrease) in the dependent variable occurring with a unit change in the independent variable; *syn.* **regression coefficient; regression weight;** (2)(with three or more variables) *syn.* **coefficient of partial regression.**

coefficient of reliability: indicates the degree of consistency with which a test or other instrument measures: *(a)* the coefficient of correlation between a series of observations or scores and an equivalent but independent series of observations or scores of the same type on the same individuals, for example, the coefficient of correlation between the scores obtained by the same group on two forms of the same test; *(b)* an estimate of consistency derived from item-test data obtained from a single administration, as the Kuder-Richardson formulas.

coefficient of validity: (1) the coefficient of correlation between a criterion variable and one or more independent variables that purport to measure or are used to predict the criterion; (2) the coefficient of correlation found to exist between the results secured from the measuring device being evaluated and those secured through the use of criterion measure.

comparability: the condition existing when scores on two or more different tests or subscales of the same test have been converted to standard scores with the same mean and standard deviation so that they may be compared; that is, conversion to standard scores makes scores on the different tests comparable.

conditioning: (1) the process by which an originally inadequate stimulus is substituted for an originally adequate stimulus in calling forth a certain response, through presentation of both stimuli in temporal or spatial contiguity; the building up of responsiveness to a specific stimulus by association; frequently used experimentally for the purpose of controlling reactions or for providing controls for experimentation; (2)(gestalt) the emergence or individuation of a particular response from a previous response less differentiated in character; the emergence induced by the repetition of certain details of a stimulus pattern; (3)(phys. ed.) the process of gradually preparing the body for strenuous physical activity.

conditioning, adaptive: the formation of conditioned responses which have value in the adjustment of the individual.

conditioning, avoidance: a form of conditioning in which the organism tries to bypass, escape from, or avoid an aversive stimulus by responding to some cue that the unpleasant stimulus is about to occur; similar to *instrumental conditioning*.

conditioning, classical: Pavlovian conditioning in which conditioned and unconditioned stimuli are invariably paired until the conditioned reflex has been established; usually involves responses controlled by the autonomic nervous system. *Syn.* **respondent conditioning.**

conditioning, inhibitory: conditioning that results in the restraint of a particular response to a stimulus and the substitution of a different response.

conditioning, operant: (1) (Skinner) a type of conditioning in which the emitted rather than the elicited behavior of the organism is manipulated; contrasted to *classical conditioning* or *respondent conditioning*, which are used to describe association in elicited behavior; *see* **behavior,** (2) in guidance, a procedure which involves the *direct reinforcement* or reward of those emergent behaviors which the therapist regards as appropriate, with little concern about anxiety extinction.

conduction, air: the process by which sound is conducted to the inner ear through the air in the outer ear canal.

conduction, bone: transmission of sound waves to the hearing mechanism through the bones of the skull, bypassing the middle ear.

congenital: actually or potentially present in the individual at birth, because of heredity or intrauterine accidents or environmental factors.

construct: (1) a property ascribed to two or more objects as a result of scientific observation; generally, a model designed with an awareness of the relationship which exists between data and the model; (2) (testing) some postulated attribute of people, assumed to be reflected in test performance; in test validation, an attribute, such as intelligence, verbal fluency, or anxiety, about which we make statements in interpreting a test.

consultant, speech-hearing: a teacher trained in speech correction and services for the hard of hearing; works with children presenting speech and hearing problems and also is available for consultation with classroom teachers, parents, physicians, or anyone responsible for the welfare of such children.

contingency management: a type of contract planning with students; determines reasonable rewards that the students prize and then establishes the schedule of increments of learning by which the students can earn the rewards.

contract, behavior: a technique described by Keirsey and used in the case of aggressive, destructive, or disruptive acts by children in school; a contract is prepared and signed by each party who agrees to play a certain role for a certain period of time; the child agrees that any disruptive act on his part will immediately result in his being asked to leave school; the teacher agrees to signal the child to leave the classroom whenever the child makes a disruptive act; the principal agrees to enforce the agreement; the parent agrees to avoid conversation with the child about school and to avoid punishing or scolding the child for being sent home; and the psychologist negotiates the contract and agrees to be available for counsel.

conversion of scores: the process or act of changing a series of test scores from one unit of measurement to another; for example, the changing of raw scores to derived scores; a process that usually makes possible direct comparison of an individual's results on more than one test or with other individuals.

coordination, locomotor: the ability to maintain balance and smooth movement while moving from one place to another through the use of physical skills.

coordination, muscular: (1) the combination of the movements of muscles in a suitable relation to give harmonious results; (2) functioning of muscles in cooperation and normal sequence in performing a physical task.

coordination, neuromuscular: in general, the acting together in a smooth, harmonious, concerted way of the muscles and nerves; in a specific instance, the nervous control of muscle contractions in the performance of a motor act.

coordination, perceptual-motor: smooth and efficient functioning of sensory and motor nerves and the connections between them, resulting in rapid reaction to stimuli with a minimum of effort.

correlated: (1) related in such a way that the distribution of one variable depends on another, thus having a coefficient of correlation different from zero; so related that the direction and magnitude of the fluctuations in one variable are directly or inversely associated with the fluctuations in the other; (2) having had the coefficient of correlation computed between two or more variables.

correlation: (1) (stat.) the tendency for corresponding observations in two or more series to vary together from the averages of their respective series, that is, to have similar relative position; if corresponding observations (for example, the scores made by each pupil on two tests) tend to have similar relative positions in their respective series, the correlation is *positive;* if the corresponding values tend to be divergent in position in their respective series, the correlation is *negative;* absence of any systematic tendency for the corresponding observations to be either similar or dissimilar in their relative positions indicates *zero correlation; syn.* **covariation;** (2) (stat.) a shortened form commonly used for *correlation coefficient;* (3) (stat.) the act or process of ascertaining the degree of relationship between two or more variables; (4) (curric.) bringing together the elements of two or more different subject-matter fields that bear on the same large problem or area of human experience in such a way that each element is reinforced, broadened, and made richer through its association with the elements from the other subject fields.

criterion: *pl.* **criteria;** (1) a standard, norm, or judgment selected as a basis for quantitative and qualitative comparison; (2) the dependent variable in study; (3) that which one is trying to predict. *See* **measure, criterion.**

cross validation: (1) empirical validation of a test or other measuring device by the administration of the unmodified test to a group other than the one(s) on which the test was standardized or from which the scoring key was derived; the process of seeing whether a decision derived from data obtained in the original validation experiment on one sample of persons is actually effective when the decision is applied to another independent sample of persons from the same population; (2) a method or process of validation or item analysis which involves the determination of the probability of occurrence of similar results in both of two samples.

curve, frequency: (1) any curve or broken line that represents a frequency distribution; the graph corresponding to a frequency table.

curve, normal probability: the graphical representation of the theoretical distribution of an infinitely large number of observations of a continuous variable varying purely by chance, resulting in a perfectly smooth, symmetrical, bell-shaped curve, having the mean, median, and mode coinciding, and which is expressed in mathematical terms as a curve whose height taken at any point on the horizontal axis is in inverse proportion to the antilogarithm of half the squared sigma distance of that point from the mean; the normal probability curve and the normal distribution are purely theoretical mathematical concepts which may be approached in practice but never actually attained. *syn.* **curve, frequency.**

d

deafness, adventitious: a condition occurring after birth (in a person born with normal hearing) as a result of accident or disease and varying in degree from mild impairment to total loss of hearing or hearing so defective as to be nonfunctional for the ordinary purposes of life; may be classified according to the nature of the disorder, as *conduction deafness, hysterical deafness, perception deafness,* and *toxic deafness.*

deafness, catarrhal: hearing loss caused by inflammation of the mucous membrane of the air passages in the head and throat with blockage of the Eustachian tube.

deafness, central: the type of hearing impairment located in the central nervous system.

deafness, conduction: an impairment of hearing due to damage or obstruction of the ear canal, drum membrane, or the ossicular chain in the middle ear; a failure of air vibrations to be adequately conducted to the cochlea.

deafness, congenital: a general term for deafness dating from birth or earlier. *See* **deafness, true congenital.**

deafness, cortical: hearing impairment that is not a loss of sensitivity but a loss of understanding; involves a difficulty in discrimination but appears more clearly in an articulation test than in a test for the difference limen of pitch or of loudness, since it cannot be explained by abnormality of the auditory organ or the acoustic nerve.

deafness, mixed: the type of hearing impairment which is the combination of perceptive and conductive hearing loss. *See* **deafness, conduction; deafness, perception.**

deafness, nerve: deafness due to defect or disease of the neural apparatus in the inner ear and of the acoustic nerve; often indicated by deficient bone conduction.

deafness, perception: deafness due to diminished or completely lost functioning of the sound-perceiving apparatus, usually indicated by partial or complete loss of bone conduction.

deafness, peripheral: any hearing impairment that is caused by an abnormality in either the sense organ or the auditory nerve. *Comp. w.* **deafness, central.**

deafness, postlingual: deafness that occurs after language has developed, usually after the age of 3 years.

deafness, potential: threatened loss of hearing, usually indicated by a slight, nonhandicapping impairment that, if not treated, may become progressively worse.

deafness, prelingual: deafness that occurs before language has developed, usually before the age of 3 years.

deafness, progressive: hearing impairment that becomes slowly or rapidly worse, even under expert treatment.

deafness, psychic: (1) strictly, inability to hear owing to the influence of some psychological mechanism such as hysteria, rather than as the result of any known physical cause; (2) sometimes used as a synonym for *cortical deafness,* that is, deafness caused by defect or impairment of the cerebral cortex, rather than of the ear.

deafness, sensory-neural: any hearing loss which derives from trauma, maldevelopment, or disease affecting the normal function of the inner ear.

deafness, tone: (1) a condition characterized by one or more gaps in the auditory range, the subject being unable to hear certain tones; *syn.* **asonia;** (2) a condition characterized by relative insensitivity to differences between musical tones, sometimes manifested by inability to distinguish one tune from another.

deafness, toxic: deafness resulting from poisons taken into or generated in the system.

deafness, true congenital: deafness present at birth and clearly traceable to hereditary causes. *See* **deafness, congenital.**

deafness, word: the inability to perceive as words the sounds which are heard; inability to associate spoken sounds with their appropriate referents; not due to damage to the mechanism within the ear or other auditory impairment.

decibel (db): a unit used to measure the relative loudness of sounds; one decibel is considered to be the faintest sound that can be heard by a normally hearing person; each decibel thereafter approximates the smallest perceptible difference in loudness of sounds; 140 decibels, a pressure 10 million times as great as one decibel, is considered to be the pain level in the normal ear; sometimes inaccurately called a *sensation unit.*

decoding: (read.) the process of translating printed or written symbols into the spoken word.

deformation, orthopedic: a condition in which muscular movement is so far restricted by accident or disease as to affect a person's capacity for self-support.

deformity: a deviation in body structure; may result from the unopposed action of the sound music against a paralyzed muscle.

desensitization: (1) therapeutic process by which traumatic experiences are reduced in intensity by repeated exposures of the individual to them either in reality or in fantasy; (2) (couns.) the lessening, by various methods and procedures, of sensitivity with respect to some personal defect, some social inferiority, etc.; (3) (spec. ed.) a type of adaptation-to-stress therapy used, for example, for beginning stutterers.

deviation, standard (σ, s, or SD): a widely used measure of variability, consisting of the square root of the mean of the squared deviations of scores from the mean of the distribution; may be expressed by the formula $\sigma = \sqrt{\Sigma x^2/N}$, where Σx^2 is the sum of the squared deviations of each score from the mean and N is the number of scores; in a normal distribution, if a distance equal to the standard deviation is laid off on each side of the mean, 68.26 percent of the observations will be included.

diagnosis: (1) the procedure by which the nature of a disorder, whether physical, mental, or social, is determined by discriminating study of the history of the disorder and of the symptoms present; (2) in guidance, the analyzing of performance of clients and the development of tests which elicit maximum information; also, the results obtained by these activities; (3) (curric.) the process of determining the existing capabilities of a student by analyzing his performance of a hierarchy of essential tasks in a specific subject, such as mathematics or music, with the intent of facilitating his learning by assigning appropriate remedial or advanced learning tasks.

diagnosis, differential: (1) search for the areas of a person's relative strengths and/or weaknesses in ability, personality, and achievement through the use of tests and other means of obtaining information about an individual; (2) the delineation of particular dynamic patterns showing how one child differs from another; (3) in medical practice, the process of determining a significant factor which is found in only one of two or more seemingly similar conditions, thus distinguishing between them; extended by analogy from its medical use to other fields such as guidance.

diagnosis, psychological: a diagnostic procedure for determining the patient's intellectual capacity, motivations, conflicts, ego defenses, environmental and self-evaluations, interests and aptitudes, and general personality organization. *See* **diagnosis, differential.**

diagnosis, reading: the analysis of reading behavior for the purpose of identifying the causes of reading retardation or disability.

difference, significant: (1) a difference which is so great that it may not be reasonably attributed to chance factors (that is, sampling errors or errors of random sampling); usually determined on the basis or a statistical test such as t, F, or x^2; (2) a difference whose probability of occurrence through chance alone is less than the selected significance level (that is, confidence level, fiducial probability, etc.). thus permitting the rejection of a null hypothesis; (3) (poor usage) rarely, a difference that appears to be significant practically, even though the difference has not been demonstrated to be significant statistically, as in (1) and (2) above.

difference, statistically significant: (1) a difference between two comparable statistics, computed from separate samples, that is of such magnitude that the probability that the difference may be imputed to chance is less than some defined limit; (2) often arbitrarily defined as a difference that exceeds two or three times the standard error of difference, or that would arise by chance 1 time in 20 or 1 time in 100, the constant employed depending on the concept of "significance" as well as on the size of the sample and the nature of the data; a statistically significant difference does not necessarily imply practical importance.

discrimination, auditory: ability to discriminate between sounds of different frequency, intensity, and pressure pattern components; ability to distinguish one speech sound from another.

discrimination, depth: apprehension of the distance of an object from the observer, of the relation between given objects and the observer, or of the spatial relation from front to back of a single solid object.

discrimination, figure-ground: (1) (auditory) the phenomenon evidenced as the auditor perceives and identifies phonemes and sequences of phonemes against the total auditory field; (2) the phenomenon evidenced as the observer recognizes the separate parts of a configuration and mentally organizes them into a meaningful whole so that they stand as figures against the remaining part of the perceptual field.

discrimination, frequency: the auditory ability to discriminate between different tone frequencies as opposed to the mere detection of sound.

discrimination, intensity: the ability to detect variations in loudness of sounds; measured in various music tests.

discrimination, negative: erroneous indication of good and poor ability or some other characteristic; typical of a test item that is answered correctly more often by the poorest students than by the best students; usually caused by faulty construction of test items.

discrimination, olfactory: variation in response according to the type, intensity, or other characteristics of the chemical substance constituting the olfactory stimulus.

discrimination, perceptual: (1) the act of discerning the differences among objects or symbols and of distinguishing one from another; in reading, the seeing of differences; (2) the power of identifying differences.

discrimination, visual: the process of distinguishing one object from another visually.

disorder, behavior: a conduct problem as contrasted with a personality problem; generally functional rather than organic in origin; in these disorders a child may appear to be "acting out" his emotional difficulties aggressively; the term is nearly synonymous with *conduct disorder* but is more inclusive of all forms of overt behavior that are socially unacceptable

distractibility: (1) variation in the ability of a person to refrain from reaction to external or internal stimuli which are extraneous to a mental task in hand, resulting in a poorer performance in terms of error or speech; (2) (spec. ed.) inability to fix attention on any subject; a symptom of the mental functioning of persons with brain injuries, whose attention is attracted by every stray stimulus coming into their sensory field.

distractor: *alt. sp.* **distracter;** any incorrect alternative in a test item providing two or more alternatives from which the examinee must select the correct response; designed to be attractive to (hence, to distract) the respondent who does not know the correct answer.

distribution: (1) a tabulation showing the frequencies or percentages of the values of a variable arranged in a sequence as to time, magnitude, etc.; (2) the act of moving finished goods to the ultimate consumer.

distribution, ability: a frequency tabulation composed of scores representative of some ability.

distribution, age-grade: the number or percentage of pupils of each age in each grade, and vice versa, usually shown by an age-grade distribution table.

distribution curve: *syn.* **curve, frequency.**

distribution, frequency: (1) a tabulation showing the frequencies of the values of a variable when these values are arranged in order of magnitude; often shortened to *distribution; contr. w.* **distribution, historical; distribution, quantity;** (2) a tabulation of scores from high to low or low to high showing the number of persons who obtain each score or group of scores.

distribution, historical: a tabulation showing the frequencies of any variable in successive intervals of time: a distribution in which time is the basis of classification. *Syn.* **temporal distribution; time distribution;** *contr. w.* **distribution, frequency; distribution, quantity.**

distribution of ability: (1) the variation in ability (whether general ability or a specific ability) present in any group of individuals under consideration; (2) the frequency of occurrence of ability at each of successive levels; usually shown by means of a table or graph, or both, representing the number and percentage of cases in each level or division, from high to low or from low to high.

distribution of scores: a tabulation or enumeration of the frequency of occurrence of each score in a given set of scores.

distribution, probability: a relative frequency distribution, showing the probability of occurrence of observations of the various possible magnitudes; a frequency distribution each ordinate of which is proportional to the probability of occurrence of an observation with the corresponding abscissa value.

distribution, quantity: a distribution showing the aggregate amount for each class, rather than the class frequency, for example, a table showing the total income received by the people at each of several income levels. *Contr. w.* **distribution, frequency; distribution, historical.**

distribution, sampling: the relative frequency distribution of an infinity of determinations of the value of a statistic, each determination being based on a separate sample of the same size and selected independently but by the same prescribed procedure from the same population.

disturbance, emotional: a deep-rooted problem involving the control and expression of feelings.

disturbance, figure-background: inability to discriminate figure from background.

disturbance, perceptual: a condition in which an individual makes different responses from the normal to stimuli, such responses being judged as inferior.

domain, affective: the area pertaining to the feelings or emotions.

dominance, central: (1) dominance in language and reading of neither the right nor the left hemisphere of the brain, as opposed to the theory of lateral dominance held by Orton and others; (2) balance between the two hemispheres of the brain in controlling voluntary action.

dominance, eye-hand: the superior development of or preference for use of the left or the right hand and the corresponding eye in reading, writing, and the performance of certain motor tasks; *crossed dominance* is said to be present when the dominant eye and the dominant hand are on opposite sides of the body.

dysfunction, cerebral: absence of completely normal function of the cerebrum, manifested by impairment in intellectual, motor, behavioral, or sense functioning and resulting in hyperactive behavior, emotional instability, perceptual difficulties, transient or persistent motor awkwardness, and various educational difficulties.

dysgraphia: a disability characterized by any of various

degrees of difficulty in writing: *Comp. w.* **agraphia.**
dyskinesia: impairment of the power of voluntary movement, resulting in fragmentary or incomplete movements.
dyslalia: faulty articulation of speech sounds due to causes other than lesions or defects in the central nervous system.
dyslexia: (1) *syn.* **reading disability;** (2) a type of visual aphasia with the associative learning difficulty; (3) a mild form of *alexia.*
dyslogia: a pathological condition that causes impairment of the power of reasoning so that ideas cannot be expressed in speech except with great difficulty; the condition is often present in certain types of feeble-mindedness, in certain psychoses, or as the result of brain damage.
dysphasia: any impairment of language functioning due to brain damage; generally synonymous with *aphasia,* although the latter term usually refers to a more profound or severe condition of linguistic disorder.
dystrophy: imperfect or faulty nutrition or development.
dystrophy, muscular: a group of diseases involving the progressive weakening and wasting of the skeletal muscles; not contagious and appears to have a hereditary basis, but the exact cause is unknown; classified according to appearance of the muscles, the group of muscles primarily involved, the age of onset, and the changes in the muscle tone and reactivity.

●

echolalia: (1) a disorder characterized by involuntary repetition of words heard spoken by others; sometime a symptom of dementia praecox; (2) more commonly, a stage in the development of the child's speech in which he repeats, or echoes with relatively low degree of awareness of meaning, the speech of others in his environment.
enuresis: involuntary discharge of the urine; may be diurnal, occurring during the day, or nocturnal, occurring during the night.
epilepsy: any of a variety of disorders marked by disturbed electrical rhythms of the central nervous system and typically manifested by convulsive attacks, usually with clouding of consciousness.
equivalent forms: two forms of a test which are so similar that they can be used interchangeably and yet are not identical; two test forms that yield about the same mean and variability of scores, and whose items are similar with respect to type, difficulty, distribution of item-test correlations, and representative coverage of content.
error of measurement: the difference between the actual measurement and that recorded by virtue of the unit being used (not because a mistake has been made); thus the error of measurement is related to the precision of measurement.
error, random: (1) an error ascribable to chance, without bias or system, such that the sum of a large number of such errors approaches zero; one of a type that in the long run does not materially alter the accuracy of a large number of observations; (2) read.) one of the errors in oral reading which have no pattern, which are due to guessing.
error, standard: the estimated *standard deviation* of the values of a score or statistical measure that would be obtained if the measurement were repeated over and over again.
evaluation instrument: any of the means by which one obtains information on the progress of the learner and the effectiveness of instruction; quantitative and qualitative data, objective measures, subjective impressions, tests, observations, anecdotal records, case studies, and sociometric methods may all serve as instruments for deciding whether instructional objectives have been attained.
evaluation, medical: (spec. ed.) determination of the nature and extent of the disability of the handicapped child (one step in determining eligibility), appraisal of the general health status of the individual in order to determine his capacities and limitations and to ascertain if physical restoration services might remove, correct, or minimize the disability condition, and contribution of a sound medical basis for selection of a rehabilitation objective.
evaluation, psychological: (1) the use of tests and other observational techniques to assess and rate the ability, achievement, interest, or personality of an individual; (2) results from a synthesis of psychometric data and information obtained during interviewing, counseling, and other aspects of the rehabilitation process; not an isolated service but closely related to counseling and all other rehabilitation services.
evaluation, pupil: a process in which a teacher commonly uses information derived from many sources to arrive at a value judgment; may or may not be based on measurement data; includes not only identifying the degree to which a student possesses a trait or to which his behavior has been modified but also evaluating the desirability and adequacy of these findings.
evaluation, test: the process of determining the merit of a test on the basis of such characteristics as validity, reliability, ease of administration and scoring, adequacy of norms, availability of equivalent or duplicate forms, and ease of interpretation.
examiner, psychoeducational: one who appraises the mental endowment and the educational attainments of children, particularly for the purpose of diagnosing learning difficulties and outlining remedial treatment.
extraneous movement: in reading, a movement of the eye, head, lips, or any muscles of the body in a manner not essential or helpful to the reading process as such.
eye coordination: (1) the functioning of the two eyes in attaining a single image in reading or other visual activities; (2) the cooperation of the two eyes in seeing; (3) the positioning of the two eyes in an orbit to maintain macular fusion. *See* **eye-muscle coordination.**
eye defect: any nonpathological structural defect of the eye, including refractive errors.
eye, dominant: the eye that leads in reading and seeing; the fixing eye.
eye fixation: a stop of the eye in reading which allows it to react to the printed stimuli; fixations account for 92 to 94 percent of reading time. *See* **fixation, binocular.**
eye-hand coordination: ability to use the eyes and hands together in such acts as fixating, grasping, and manipulating objects.
eye movement: (1) changes in the position of the eyeball brought about by the activity of the external eye muscles; described as fixation, convergence, divergence, elevation, depression, pursuit, nystagmus, etc.; (2) the left-to-right progression of the eyes along a line of print (including fixations and the movement between fixations) and the return sweep to the beginning of the next line.
eye movements, coordinated: associated movements where both eyes move simultaneously.
eye-muscle balance: the normal condition of the eyes in which the large, or extrinsic, muscles that control the movement of the eyeball in the socket direct the eyes in the correct visual angle.
eye-muscle coordination: (1) the normal condition of the normally functioning eye, in which the muscles that control vision work in balance; (2) ability to make the eyes work together in harmony without any deviation of either eye from the normal visual angle.
eye preference: a tendency toward use (typically unconscious) of a "preferred" eye when sighting objects, looking through small apertures, winking, etc.
eye span: the amount of material grasped during one fixation pause of the eyes, measured in terms of either letters or letter spaces.
eye-voice span: (oral read.) the distance, usually measured in number of letters, between the word being spoken and the word on which the eyes are focused. (The voice lags behind

the eyes.)

eyedness, left-: the tendency for the left eye to assume the major function of seeing, being assisted by the right eye; usually associated with left-handedness.

eyedness, right-: the tendency for the right eye to assume the major function of seeing, being assisted by the left eye; the most common type of *eyedness*, usually associated with right-handedness.

eyestrain: a condition of the eye caused by overuse, uncorrected refractive error, or external conditions such as glare.

f

faulty emphasis: (1) speech characterized by a pattern of pitch and intensity variation, or accent, such to produce relative distortion of meaning; (2) distribution of the relative stress on sounds and words to produce a pattern not characteristic of the speech being used, as in foreign accent or dialect, although the meaning may or may not be distorted.

feedback, psychological: the process whereby the individual gains information concerning the correctness of his previous responses in order that he can adjust his behavior to compensate for errors; involves a complex interaction between motives, goals, and information regarding progress toward these goals; a more inclusive expression than *knowledge of results*, which it is tending to replace.

field of vision, binocular: the combined fields of the two eyes, which overlap centrally and extend 160 to 180 degrees horizontally.

field of vision, peripheral: that outermost area of the retina in which there are rods but no cones; while differences of brilliancy are perceptible, colors are indistinguishable in this area.

fixation, binocular: (1) the act of focusing both eyes on the same point in space; (2) the normal pause of both eyes, as in reading, for the purpose of perception.

footedness: preference for either the right or the left foot in tasks performed with one foot, such as kicking a ball or operating a treadle, or in the more difficult or skilled parts of tasks requiring the use of both feet.

functional disorder: (1) a disorder resulting from a psychological cause without any known or discernible alteration of physical structure, for example, hysterical blindness; (2) a disorder in the function of an organ or part brought about by another function, for example, heart palpitation brought on by indigestion.

functional education: education for which there is an anticipated application, which thus assumes that the learner has immediate meaning, translatable into action, for his learning activities.

fusion, auditory: the act or process of blending separate sounds into words.

fusion, binaural: the mental process of combining the sounds heard by both ears into a single, blended impression.

fusion of partial impressions: in creative activity, arriving at an experience of the whole by blending into a single image a series of numerous partial impressions; refers especially to the fusing of partial tactile impressions of the blind.

fusion plan: (spec. ed.) a plan whereby children enrolled in special classes due to exceptional educational needs are integrated on a part-time basis into regular classes for the purpose of social interaction and reduction of stigmatizing effects of the special class.

g

gait, ataxic: the characteristic walk of a patient afflicted with ataxia; the foot is raised very suddenly, often abnormally high, and then jerked forward and brought to the ground again with a stamp and often heel first; by adoption of a broad base, effort is made to counteract the unsteadying effects of this style of progression. *See* **ataxia.**

gait, dromedary: in walking, a twisting movement of the extremities, lordosis, and spine twisting; clownish contortions resembling a camel's walk.

gait, high steppage: a gait characteristic of some handicapped, in which, since the patient wishes to avoid tripping from his toes catching the ground, the foot is raised high, then thrown forward, striking the ground forcibly as if the patient were continuously stepping over obstacles in his path.

gait, proper normal: procedure in walking whereby the person bears the weight momentarily on the heel and then upon the outer border of foot; the heel is next raised and the weight put on the toes, and finally the body is lifted over the tips of the toes.

gait, scissors: a gait disturbance caused by the fact that spasticity of the muscles holds the thighs in adduction, causing the legs to draw together.

gait, spastic: a gait in which the patient has difficulty in bending his knees and drags his feet along as if they were glued to the floor, the toes scraping the ground at each step; the foot is raised from the ground by tilting the pelvis and the leg is then swung forward so that the foot describes an arc, crossing the other foot in a "scissors" manner.

gait, waddling: a gait like that of a duck; the body is usually tilted backwards, there being a degree of lordosis present, the feet are planted rather widely apart, and the body sways more or less from side to side as each step is taken; the heels and toes tend to be brought down simultaneously; the chief peculiarities of this gait are due to a difficulty in maintaining the center of gravity of the body because of weakness of the muscles of the back; it is met in pseudohypertrophic muscular dystrophy and congenital dislocation of the hip.

grade equivalent: (1) a converted score expressed in terms of a scale in which the grade is a unit of measurement and indicating the grade level of the group for which the score is typical or average; for example, a grade equivalent of 6.4 is interpreted as the fourth month of the sixth grade; (2) any symbol used in place of a numerical score or mark; thus A may replace or stand for the mark 90.

grade level: a measure of educational maturity stated in terms of the school grade attained by an individual pupil or a group of pupils at a given time.

group, peer: usually interpreted as people who are similar in developmental level; occasionally refers to persons similar in respect to other qualifications, such as status or education.

grouping, ability: grouping of pupils within classes or schools on the basis of some measured mental ability.

grouping, heterogenous: the classification of pupils for the purpose of forming certain groups having a high degree of dissimilarity.

grouping, homogeneous: (1) the classification of pupils for the purpose of forming instructional groups having a relatively high degree of similarity in regard to certain factors that affect learning; (2) the procedure of organizing data in subject-matter fields or areas of experience into groups or divisions, the parts of which are relatively alike in respect to one or more characteristics, such as degree of difficulty, usefulness, or appeal to pupils.

h

habitation: the act or process of training to do something for the first time without any previous point of reference.

handedness: preference for either the right or the left hand in tasks demanding the use of one hand or in the more difficult or skilled parts of tasks demanding the use of both hands. *See* **laterality.**

handedness, left-: dominant or preferred use of the left hand in functions involving the use of a single hand. [Anomalies of reading and writing (mirror image writing, slanted writing, etc.) are frequently present.] *See* **handedness, right-; laterality.**

handedness, right-: dominant or preferred use of the right hand in functions involving the use of a single hand.

hard of hearing: having defective hearing that is, however, functional for the ordinary purposes of life (sometimes with the use of a hearing aid). *See* **hearing loss, moderate.**

hard palate: the hard portion of the roof of the mouth supported by the maxillary and palatine bones.

head movement: the movement of the head instead of the eyes in reading, a sign of ineffective eye-movement habits.

hearing aid: any device which amplifies or focuses sound waves in the listener's ear; usually refers to the various types of wearable amplifiers which operate with miniature loudspeakers in the ear or oscillators on the head.

hearing aid, monaural: a hearing aid which has only one transmitting channel.

hearing, binaural: hearing with two ears; made possible by the independent functioning of each ear and the existence of separate, though interconnected, pathways from each ear to the brain; the phenomenon most characteristic of binaural hearing is ability to localize the direction from which a sound comes. *See* **localization, auditory.**

hearing, cross: hearing which occurs when sound is applied to one ear, by either an air-conduction or a bone-conduction transducer, and excitation of the other ear is produced by conduction across the bony structure of the skull.

hearing impairment: the most general term for malfunction of the auditory mechanism; does not distinguish either the anatomical area primarily involved or the functional nature of the impairment.

hearing impairment, acquired: hearing loss resulting from damage to hearing that was formerly normal.

hearing impairment, central: an impairment in hearing of which the cause is located somewhere in the central nervous system.

hearing impairment, congenital: hearing loss present at the time of birth; may be either hereditary or acquired.

hearing impairment, hereditary: hearing loss resulting from a defect in the genes at the time of conception.

hearing loss, conductive: the type of hearing loss caused by a plugging of the external ear canal, restriction of the free movement of the eardrum, or restriction of the movement of the bones in the middle ear. *Comp. w.* **hearing loss, perceptive.**

hearing loss, marked: average loss of 55 or 60 to 65 or 75 decibels; people with such a hearing loss are borderline between hard of hearing and deaf.

hearing loss, mixed: a combination of conductive with sensory-neural hearing loss.

hearing loss, moderate: a loss of 25 to 50 or 55 decibels in the speech range in the better ear; a person with such a loss is classified *hard of hearing.*

hearing loss, noise induced: loss of hearing acuity caused by frequent exposure to high-intensity sounds, which damages portions of the inner ear.

hearing loss, perceptive: the type of hearing loss resulting from pathology in the inner ear and in the cranial nerve and its primary auditory nuclei; also called *nerve-type hearing loss. See* **hearing loss, conductive.**

hearing loss, profound: a loss of from 70 or 75 decibels (in the speech range) up to the inability to distinguish more than one or two frequencies at the highest measurable intensity in the better ear.

hearing loss, slight: average losses of 20 decibels or less in the speech range in the better ear; people with such a hearing loss are borderline between those with normal hearing and those with significantly defective hearing.

hearing, monaural: the process, function, ability, or power of perceiving sound through only one auditory mechanism, or ear.

hearing, normal threshold of: in testing hearing acuity, the minimum intensity of the tone which elicits responses on 50 percent of the trials; the manner of listening (open acoustic field or under an earphone) and the place and method of measuring the sound pressure level must be defined; there are thus many different values for the normal threshold of hearing.

hearing threshold, pure-tone: that intensity of pure tones at a given frequency which can just barely be heard; in hearing measurement terms this is at a 50 percent criterion level.

hyperactivity: (1) a characteristic of the constitutionally active child who often meets restrictions with antagonism and needs space and opportunity for muscular activity to prevent chronic hostility patterns; (2) chronic aggressive reaction pattern due to brain damage.

hyperdistractibility: a highly inadequate attention span resulting in inability to focus attention selectively on one major aspect of a situation, making it the foreground, instead of shuttling back and forth among inconsequential details; the two types are *(a) external,* inability of the child to learn the lesson being put on the blackboard because his attention is preempted by the movement of chalk, and *(b) internal,* exemplified by the child who repeatedly interrupts his seat work to ask irrelevant questions.

hyperesthesia: a condition characterized by acute and excessive sensibility to stimulation.

hypermnesia: a state in which recall and memory are heightened; may describe unusual mental ability within an individual either as a trait or as a transient condition brought about usually by strong emotion.

hyperopia: a refractive error in which, because the axis of the eyeball is too short or the refractive power of the lens weak, the point of focus for rays of light from distant objects is behind the retina.

hyperprosexia: abnormal absorption of the attention by a single stimulating condition together with inability to ignore the stimulus.

hypersensitivity: a reaction to criticism due to a lack of self-assurance; may be an indication of personality problems.

hypertonicity: excessive muscular tension; characteristic particularly, but not exclusively, of the speech musculature in varying degrees in stuttering, spastic speech, and certain voice disorders.

hypothymia: a condition characterized by reduced capacity for emotional response.

I

idiolalia: (1) unintelligible speech caused by sound substitutions, omissions, and transpositions; (2) a language invented by a child which is based on a formula and is rarely entirely original. *Syn.* **idioglossia.**

illness, mental: illness manifested by the emotional disturbances observed in the extremely disturbed child; may be recognized by symptoms of extraordinary aggression or withdrawal, the child requiring highly modified programs or institutional treatment before being able to function in the general framework of school classes.

image, auditory: the mental reconstruction of a hearing experience or the mental combining of separate hearing experiences.

impairment, physical: a physical condition which may adversely affect a pupil's normal progress in the usual school program; examples are asthma, epilepsy, cerebral palsy, diabetes, an allergy, a heart condition, a crippling condition, a physical developmental problem, and an impairment of sight, hearing, or speech.

impartiality: an attitude of approach to a subject or problem which forbids predetermination of conclusions and requires the patient withholding of judgment until all relevant data have been considered; both a teaching and a learning attitude, it need not necessitate elimination of convictions or loyalties but does require frank acknowledgment of these and willingness to reexamine them.

instruction, programmed: instruction utilizing a workbook, textbook, or mechanical and/or electronic device programmed to help pupils attain a specified level of performance by *(a)* providing instruction in small steps, *(b)* asking one or more questions about each step in the instruction and providing instant knowledge of whether each answer is right or wrong, and *(c)* enabling pupils to progress at their own pace, either individually through self-pacing or as a team through group pacing. *Syn.* **autoinstruction; automated teaching;** *see* **conditioning, operant;**

instruction, small-group: organization of subgroups within a class for the conduct of teaching-learning according to *(a)* interest in particular problems or activities, *(b)* specific skills, *(c)* social needs, such as security, affection, or a sense of belonging, or *(d)* educational needs, based on a concept, content, or achievement.

integrated experience approach: an approach to instruction that involves the teacher in identifying as clearly as possible those responses, attitudes, concepts, ideas, and manipulatory skills to be achieved by the student and then in designing a multifaceted, multisensory approach that will enable the student to direct his own activity to attain these objectives; the program of learning is organized in such a way that students can proceed at their own pace, filling in gaps in their background information while omitting the portions of the program which they have covered at some previous time.

intelligence: (1) the ability to learn and to criticize what is learned; (2) the ability to deal effectively with tasks involving abstractions; (3) the ability to learn from experience and to deal with new situations; (4) as commonly used in measurement and testing, a degree of ability represented by performance on a group of tests selected because they have proved their practical value in the prediction of success in academic work and in some vocations.

intelligence, abstract: the ability to make effective use of abstract concepts and symbols in thinking and in dealing with new situations; involves the ability to generalize and a high degree of skill in nonmechanical, verbal thinking; for example, the type of intelligence displayed by the philosopher or mathematician.

intelligence, average: (1) the mean or median of the population in general on a measure of brightness or mental maturity (an IQ of 100 is generally accepted as representing average brightness; a mental age of 16 years has been accepted by some as representing average mental maturity for adults, although a mental age of 13 years 5 months, based on Army Alpha test results during World War I, is often used as an indication of average adult mental maturity); (2) the mean or median intelligence, in terms either of brightness or of mental maturity, of any group of persons. *See* **intelligence; quotient, deviation intelligence.**

intelligence, basic: the native capacity for adaptive responses; that capacity for correct discrimination, attention, and adjustment to situations which is prerequisite to learning and general mental development.

intelligence, borderline: (1) a level of mental development found in a person who is not readily classified as either normal or feebleminded; ordinarily used to describe the intelligence of those higher-grade feebleminded who, under proper social conditions, could make adequate adjustments to many life situations and would not need to be institutionalized; (2) a degree of ability represented by an IQ between 70 and 80.

intelligence, cognitive: that mental functioning involved in perceiving, knowing, and understanding; sometimes measured through the use of problems involving relationships; sometimes restricted to performance in perceptual tasks.

intelligence, general: the general ability or capacity for adjustment possessed by the individual in contrast to his specific, special, or relatively independent abilities. (One of the most characteristic features of the concept is the theory that, regardless of its exact nature, general intelligence not only remains relatively constant but also appears as a common factor in instances of special abilities.)

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inventory, speech: analysis or detailed description of a person's speech, in terms of its differentiating characteristics with regard to articulation, phonation, breathing, syntactical organization, vocabulary, rhythm, etc.

item, culture-fair: (1) an item of an intelligence or achievement test which is not biased in favor of one or more of several socioeconomic groups; (2) an item of an intelligence or achievement test which is equally difficult and equally valid when used with different national groups or with persons from different levels of society.

k

kinesthetic method: (1) a method of teaching the child to read number concepts and to spell by tracing with his finger the written forms of works or by writing and at the same time sounding the words written; *syn.* **tracing method;** (2) a technique for the treatment of faulty speech by attempting to make the speech-defective person conscious of the movements and positions of the speech organs necessary for correct speech production, by means of auditory, visual, and kinesthetic impressions.

l

laterality: (1) sidedness; preferential use of one hand rather than the other (particularly in tasks demanding the use of one hand only), one eye rather than the other (as for initial sighting), one foot rather than the other (as in kicking a ball); a combination of the three factors, eyedness, handedness, and footedness; (2) assumed dominance of the left over the right cerebral hemisphere, or vice versa, with respect to motor functions of the individual.

lisp, lateral: (1) defective production of the *s* sound, characterized by an emission of air through either side or both sides of the mouth, as in the substitution of *sh* for *s;* (2) a severe form of nervous lisping accompanied by facial contortions.

lisp, nasal: a strong fricative sound produced by forcing air through the nasal passages when a voiceless *m* or *n* is substituted for *s;* usually occurs when *s* precedes *m* or *n*, as in *small* or *snare.*

lisp, occluded: substitution of *t* for *s*, as in *tay* for *say;* referred to as occluded because the airstream is more nearly shut off than in the substitution of *th* for *s.*

lisping, neurotic: (1) any articulatory defect caused by or closely related to a personality maladjustment; (2) faulty production of the fricatives, particularly the *s* sound, as in *thaw* for *saw*, due to the retention of generally infantile social reaction tendencies.

localization, auditory: the process of identifying the direction from which a sound comes; an association accomplished by the cephalic reflex, which consists of turning the glance toward the presumed source of sound until the characteristics of the sound are equal for the two ears.

m

mainstream: (spec. ed.) that part of the total public school program not concerned with special education services for exceptional children.

maladjustment, educational: (student-personnel work) (1) any discrepancy between the vocational needs of the individual and his training program; (2) scholastic achievement below the minimum established through faculty regulations for continued residence and graduation; (3) achievement below that expected in view of a student's aptitude.

maladjustment, emotional: a condition in which the person's emotional state does not permit satisfactory reaction to existing environmental factors or interpersonal relationships.

maladjustment, personality: failure of an individual, through inherent weakness or faulty development, to adapt his behavior to the demands of the environment.

maladjustment, social: (1) inability, varying in degree, to accept and behave in accordance with the forms and values of the society in which one lives; (2) inability of a social system to function efficiently because of lack of integration of the parts; (3) inability to satisfy a desire for the enjoyment of social experiences or to associate satisfactorily with groups engaging in social and recreational activities.

malbehavior: action that interferes with harmonious interpersonal relations or action that is not appropriate to the situation.

measure, criterion: (1) a measure listing specific behaviors implied at each level of proficiency, identified and used to describe the specific tasks a student must be capable of performing before he achieves one of these knowledge levels; it is in this sense that measures of proficiency can be criterion-referenced; (2) a measure which provides information as to the degree of competence attained by a particular student which is independent of reference to the performance of others; (3) a score in the criterion or dependent variable; a score, measure, or observation on the variable that is to be predicted by means of a regression equation; *syn.* **score, criterion.**

measure, norm-referenced: a measure which indicates a student's relative standing along the continuum of attainment; provides little or no information about the degree of proficiency exhibited by the tested behavior in terms of what the individual can do; tells that one student is more or less proficient than another but does not tell how proficient either of them is with respect to the subject-matter tasks involved.

measurement, criterion-referenced: measurement, against a standard of achievement, of how well a student can perform; represents an absolute grading system; that is, "yes, he can"; "no, he can't"; whether the instructional objectives require the standard to be related to the group or to success on the job, the test should allow for prediction; the instructor may require all students to get certain questions correct, an absolute standard; from this criterion he can accurately predict future success on the job. *Ant.* **measurement, norm-referenced.**

memory, auditory: power of *(a)* recognition, *(b)* voluntary recall, and *(c)* (at maximum efficiency) reproduction in speech or by other means of sound quality, intensity, pitch, and rhythm. *See* **memory, tonal.**

memory span: the compass of the memory; the number of items that can be reproduced correctly after a single presentation; commonly measured in tests of intelligence by repetition of digits, words, or sentences.

memory span, auditory: the number of related or unrelated items that can be recalled immediately after one hearing.

memory, tonal: the ability to recall patterns of tones; measured in various music tests, generally by requiring a comparison of two series of tones.

mental retardation, cerebral trauma: an etiological classification including those cases occurring during the birth process in which the mental retardation is primarily the result of cerebral injury.

mental retardation, congenital cerebral maldevelopment: an etiological classification of mental retardation including all conditions, acting at any time during prenatal life, which have interfered with the normal development of the central nervous system and which thus are directly responsible for the mental retardation; includes Mongolism, cranial anomalies, phenylketonuria, congenital ectodermoses, cerebral palsy, skeletal defects, prenatal infections, and other forms.

mental retardation, degree of: quantification of grades of retardation, from slight to great, based on psychological evaluation, including tests, observations, histories, and related findings concerning maturation, learning capacity, and social adjustment; degree of retardation is relative to cultural norms, demands, or stresses and hence modifiable.

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mental retardation due to convulsive disorders: an etiological classification where the causative factor or factors originate in the epileptic state itself and lead to mental retardation.

mental retardation, endogenous: mental deficiency in those cases where biological factors have resulted in an impairment of the central nervous system; a genetic retardation.

mental retardation, exogenous: mental retardation occurring after birth.

mental retardation, kernicterus: an etiological classification descriptive of the cerebral abnormalities resulting from isoimmunization due largely to the Rh or other blood factors.

mental retardation, postnatal cerebral infection: an etiological classification referring to mental retardation resulting from cerebral abnormalities following infectious processes directly involving the brain and occurring at any time after birth.

mental retardation, progressive: mental deficiency from arrested mental development that is continuing and increasing in severity.

mental retardation, progressive neuronal degeneration: an etiological classification of mental retardation including a number of specific conditions having in common the presence of a degenerative process involving any part of the central nervous system.

mental retardation, psychogenic: mental retardation in which causative agents are primarily environmental factors which may be psychological, sociological, or even physical, as in the case of the hard of hearing or the blind; a condition in which the individual is mentally retarded, has adequate genetic endowment as regards intelligence with no evidence of prenatal or postnatal cerebral injury or maldevelopment and with normal cerebral dynamics physiologically. *Syn.* **apparent mental retardation.**

mental retardation, severe: retardation of the totally dependent child who is unable to be trained in total selfcare, socialization, or economic usefulness and who needs continuing help in taking care of his personal needs.

mentally retarded, mildly: individuals whose IQs range from 60 to 80 approximately and who are capable of becoming literate and of sustaining themselves with only minimal assistance.

mentally retarded, moderately: individuals whose IQs range from 40 to 60 approximately; many are capable of achieving partial self-support in a sheltered workshop situation and a few in cooperative employment.

mentally retarded, trainable: mentally retarded individuals who may be trained to perform some personally and socially useful operations, but who cannot acquire functional literacy. *See* **mental retardation, degree of; retardation, mental.**

mnemonic device: any artificial device, such as a familiar or striking formation of words, an acronym, a jingle, etc., to aid the learner in retaining memorized information.

mobility: (1) the capacity for being moved with relative ease; for the human being, this implies an interaction with his surroundings, influencing as well as being influenced by his environment; (2) (spec. ed.) the ability to move oneself from one's present position to one's desired position in another part of the environment.

mutism: a symptom arising from disorders of either attention or association or of volition, or of reactions (as a form of negativism), or having a hysterical or delusional basis; manifested by not speaking when reasonably expected to speak.

myopia: a defect of refraction in which the axis of the eyeball is too long or the refractive power of the lens too strong, with the result that the focal image is formed in front of the retina.

myotonia: increased muscular irritability and contractility with decreased power of relaxation; tonic spasm of muscle.

mythomania: an abnormal tendency to exaggerate and to report imaginary events.

n

near point of accommodation: the nearest point at which the eye can perceive an object distinctly; varies according to the power of accommodation of the individual eye.

near point of convergence: the nearest single point at which the two eyes can direct their visual lines, normally about 3 inches from the eyes on the midline between them.

need, educational: specific knowledge, skill, or attitude which is lacking but which may be obtained and satisfied through learning experiences.

neurophrenia: a disturbance of the central nervous system, to be differentiated from *exogenous mental retardation*, in which the intellectual impairment is primary and the social and other accompaniments are secondary, and from *cerebral palsy*, in which the motor impairments are primary and the other involvements are secondary, by a brain injury resulting in minimal physical involvement with a syndrome of behavior disturbances and in distorted intellectual functioning which is defective rather than deficient; prognosis is usually favorable. (The term has not been widely accepted.)

neurosis: mental disorder of varying degrees of severity, often characterized by tics, mannerisms, obsessions, phobias, anxiety, hysterical behavior, or neurasthenic exhaustion, and for which, usually, no organic basis can be found; less severe than a psychosis, and usually not of sufficient seriousness to warrant treatment of the individual in an institution for the mentally deranged. *Contr. w.* **psychosis.**

neurosis, anxiety: (1) a functional disorder of the nervous system characterized by objectively unfounded dread, fear, or feeling of insecurity; (2) a strong emotional attitude in which unfounded fear or dread predominates.

neurosis, compulsion: a neurosis whose most conspicuous symptoms are compulsions which seriously impair the fulfillment of mature objectives; closely related to obsessional neurosis. *See* **neurosis, obsessional.**

neurosis, traumatic: a condition following injury or fright, as in accidents or war, which presents physical signs that are motivated emotionally; characterized especially by inhibition of function and a marked tendency to repeat consciously the emotions of the trauma, often reproducing portions of it in hallucinations or catastrophic dreams accompanied by intense anxiety; an example is shell-shock. *Syn.* **compensation neurosis.**

norm: (1) the standard or criterion for judgment; (2) in axiology, a standard for judging value; (3) in logic, a rule of valid inference; (4) in psychology, a single value or range of values constituting the usual performance of a given group; any measure of central tendency or a range of values on each side of that measure; the range to be included in the norm is arbitrary but is usually no greater than twice the standard deviation; (5) in philosophy, an ideal of excellence.

norm, age: (1) a statement of the mean or median achievement, intelligence, or other characteristic of a group of pupils of a designated chronological age; (2) the chronological age corresponding to a particular score on a standardized test and representing the typical life age of individuals achieving that score.

norm, behavior: (1) the typical level of behavior, quantitative or qualitative, found for and expected of individuals who are members of a specified sex, age group, or cultural group; the term may be applied to the typical behavior of any specified group; (2) a culturally prescribed course of action that is to be followed in a given situation.

norm, composite: a statement representing typical performance, usually in terms of the mean or media for a specified group of pupils, or a total score obtained by optimum or arbitrary weighting of two or more component scores. *See* **norm.**

norm, grade: (1) the mean or median achievement of pupils in a given school grade on a given standardized test; (2) the average status of pupils in a given grade in regard to a single factor, such as weight or height.

norm, local: a locally established numerical basis for interpreting the test scores attained by pupils in a particular institution, curriculum, or locality.

norm, percentile: (1) a point on a scale of measurement defined by the percentage of cases in a large representative sample or population obtaining a score equal to or less than the value at that point; (2) *pl.* a set of values, usually in tabular form, indicating for each integral score on a test the percentage of cases in a given group who fall at or below that point. *See* **norms.**

norms: standards or criteria; for example, test norms give information about the performance of a particular group on a particular test and thereby provide a set of criteria against which can be compared the performance of any individual taking that particular test.

norms, national: units used as national reference groups to assess comparatively other groups or individuals. *See* **norm, national.**

norms, percentile-age: tables based on the performance of a defined age group by means of which test scores can be converted into percentile ranks; used in determining relative placement of pupils in appropriate age groups. *See* **norm; norm, age; norm, percentile.**

norms, percentile-grade: tables based on the performance of a defined grade group by means of which test scores can be converted into percentile ranks; used in determining relative placement of pupils in appropriate grade groups. *See* **norm; norm, grade; norm, percentile.**

nystagmus: involuntary movement of the eye which may be lateral, vertical, rotary, or mixed.

o

occlusion: (1) shutting in or out by closing a passage, as the occlusion of the breath stream in the process of speaking; (2) the manner in which the teeth fit together when the jaws are closed.

oculomotor process: any of the motor processes involved in eye movement and in the focusing and adjusting of the eyes in the act of seeing.

oculophotometer: a portable instrument for photographing the movements of both eyes during reading; more recently known as the *ophthalmograph*.

oligophasia, central: a disorder of symbolization caused by imperfection of auditory-perceptual or other perceptual and sensory-motor schemata, so that a symbolic schema of language cannot be clearly evolved.

oligophasia, expressive: a disturbance in the process of recognizing and forming phonemic patterns and in transferring them to the executive organs of speech.

oligophasia, receptive: a disturbance in auditory perception so that foreground and background relations cannot be clearly recognized.

ophthalmoscope: an instrument with a perforated mirror, used in examining the interior of the eye.

orthopsychiatry: guidance or clinical practices based on the combined findings of psychiatry, pediatrics, psychology, and social work.

otologist: a physician who specializes in diseases of the ear; preferred to the term *aurist*.

P

palate: the roof of the mouth, consisting of the forward hard part, or hard palate, and the back soft part, which is the *velum*, or soft palate.

paralysis: partial or complete loss of ability to move voluntarily a part or member of the body normally under voluntary control.

paralysis, flaccid: a disturbance of muscle function in which joint motion in the direction of contraction in which joint motion in the direction of contraction does not exist, the muscle is lifeless and flabby, and all attempts at direct stimulation fail.

paralysis, hysterical: apparent loss of the power to move a part of the body with no apparent defect in the motor nerve system.

paralysis, organic: paralysis due to a defect either in the paralyzed organ or in the nerve supplying it.

paralysis, progressive: increasing loss of ability to move voluntarily a part or member of the body.

paralysis, spastic: one of the major diagnostic classifications of *cerebral palsy* caused by damage in the prerolandic area of the cerebral motor cortex and distinguished by the stretch reflex and by hyperirritability of the muscle(s) to normal stimuli.

pathogenic: productive of or causing marked symptoms of disease.

perception, auditory: the ability to hear sounds; in reading, the ability to hear the vowels and consonants in words that differentiate one word from another.

perception, depth: the ability to perceive the solidity of objects and their relative position in space.

perception, kinesthetic: identification and recognition of a word through tracing or writing, involving the sense of touch and the motor accompaniments of writing.

perception, object: the ability to perceive obstacles without the use of sight and to judge accurately their distance; also called *facial vision, obstacle perception*, or *obstacle sense*. (It was found that audition is the necessary and sufficient condition for object perception, that pitch is the auditory dimension involved in the perception, and finally that high audible frequencies of approximately 10,000 H2 and above are necessary stimulus conditions.)

perception, tactile: the capacity of the organism to gain information from cutaneous contact through active or passive touching; also called *tactile awareness*.

perception, visual: recognition through visual clues of the orientation of figures in space, for example, the distinction between right- and left-sided right-angle triangles, between a foreground figure and a confusing background, etc.

perception, visual-auditory: the perception of a word through the use of both visual and auditory clues occurring simultaneously.

performance, intellectual: (1) an action in which excellence or superiority depends primarily on abstract mental ability; (2) any action requiring the manipulation of abstract concepts or mental manipulation of any sort; (3) the display of intellect or the use of the higher thought processes such as memory, perception of meanings, or reasoning; (4) a response in which truth or the right answer is arrived at through covert behavior.

peripatology: the art and science of aiding a blind or severely visually impaired individual to make full use of his remaining senses and to use those aids, methods, services, and skills which enable him to move about with confidence, safety, and purpose.

perseveration: (1) the phenomenon of persistence of sensation, as in the case of color sensation after the withdrawal of the color stimulus; (2) the tendency of an idea, sensation, feeling, emotion, or pattern of behavior to recur or to continue, once begun, and run a temporal course; (3) the abnormal tendency of the individual to continue an activity after the removal of the stimulus or after it is appropriate to go on to a new task.

personality: the total psychological and social reactions of an individual; the synthesis of his subjective, emotional, and mental life, his behavior, and his reactions to the environment; the unique or individual traits of a person are connoted to a lesser degree by *personality* than by the term *character*.

personality, autistic: a type of personality characterized by social withdrawal and by the tendency to live in a thought world whose form is largely a function of the individual's desires rather than of any realistic appreciation of the conditions actually obtaining in the world.

personality, dual: a mental disorder characterized by disturbed consciousness in which the individual leads two lives alternately, each phase being consecutive but neither personality being fully aware of the experiences of the other.

personality, paranoid: an abnormal psychic condition in which two or more relatively distinct sets of experiences, such as emotions, ideas, and habits, reveal themselves in the same individual, especially when under hypnotic influence or other abnormal conditions.

personality, psychopathic: a diagnostic term used variously by different psychiatrists; designates special types of abnormal personality, with or without definite psychosis, characterized predominantly by a profound disregard of social institutions and/or morals and a marked incapacity to restrain antisocial impulses, though intellectually there is normal awareness of the laws and mores of the consequences of their violation.

personality, schizoid: the kind of personality ascribed to individuals whose attitudes and behavior are characterized by introversion and seclusiveness.

phobia, school: a generalized irrational anxiety expressed in deterioration of self-control when in school or when forced to attend school.

phoneme: (1) a single speech sound; (2) a group of slightly varying forms of what is generally considered to be one speech sound but that vary according to stress, rate of articulation, adjacent sounds, etc.; for example, the r sounds in *rat, dry, very* and *borrow* though somewhat different in manner of production and in sound, all belong to the r phoneme; (3) in linguistic analysis, a family of sounds in a given language which are related in character and are used in such a way that no one member of the family ever occurs in the same phonetic context as another member.

phonics: (1) phonetics as applied to the teaching of reading; (2) the use of speech sounds, and letters that represent speech sounds, in the teaching of reading as a means of helping the pupil achieve independence in the recognition of words.

physical education, adapted: a program of individually prescribed exercises or activities designed for those who need special programs.

physical education, developmental: the practice of physical education designed to increase muscular strength, flexibility, coordination, and cardiorespiratory and muscular endurance of handicapped children.

placement: (couns.) the assignment of a person to a suitable class, course, job training institution, or educational institution in accordance with his aims, capabilities, readiness, educational background, and aspirations.

prolongation: (1) that form of stuttering in which the sound being spoken is abnormally prolonged, generally with noticeable muscular strain; (2) a voluntary prolonging of a sound, without strain, sometimes employed in the treatment of stuttering, on the assumption that the stutterer's emotionality, anxiety, and straining reactions are thus reduced. *See* **stuttering.**

psychologist, clinical: a specialist with a Ph.D. in clinical psychology who concerns himself with persons suffering from emotional disorders.

psychologist, consulting: (1) a psychologist who acts as an expert adviser to his clients in matters pertaining to psychological problems; usually, a specialist in a particular area, such as clinical, industrial, business, advertising, or educational psychology, his competence depending on sufficient knowledge of the special area so that he can exercise guidance in the solution of the psychological problems involved; (2) a diplomate of the American Board of Examiners in professional psychology.

psychologist, counseling: a professional psychologist who specializes in counseling; his training equips him to deal with personal problems not classified as mental illness, though they may be sequels or corollaries of mental or physical illness, for example, the academic, social, or vocational problems of students.

psychologist, school: a school staff member with specialized training in psychological procedures and techniques (preferably holding at least an M.A. degree in psychology) who provides intensive, individual psychological studies of pupils; the resulting information and understandings are used in consultation and follow-up services with children, parents, teachers, and other professional workers in the school and in the community.

psychology, adolescent: the study of the behavior of human beings during the period of adolescence, dealing with such topics as adolescent interests, physical and mental growth, ideals and morals, causes of unintelligent and delinquent behavior, adjusting the school and the home to the adolescent, and organizing a community for adolescent welfare.

psychology, clinical: a form of applied psychology that aims to define the behavior capacities and personality characteristics of an individual through methods of measurement, analysis, and observation and on the basis of these findings makes recommendation for management of the individual or carries on educational, counseling, and psychotherapeutic procedures.

psychology, educational: (1) the investigation of the psychological problems involved in education, together with the practical application of psychological principles to education; (2) a study of the nature of learning.

psychometrics: (1) the branch of knowledge that is concerned with the development and application of mathematical and statistical methods for the measurement of psychological traits and analysis of psychological data; encompasses such areas of study as test theory, psychological scaling theory, and latent trait analysis; (2) psychological testing; measurement by means of psychological tests; (3) measurement in psychology. *Syn.* **psychometry.**

psychometrist: one who administers, scores, and interprets psychological tests.

psychometrist, school: a school staff member with special training in psychological testing procedures and techniques who is responsible for testing in connection with case studies of individual pupils.

psychomotor: *adj.* pertaining to muscular action which follows directly from a mental process; important in vocabulary proficiency, the performing arts, and sports.

psychosis: a major or generalized mental disorder characterized by persistent and extensive ignoring of reality and one's surroundings, usually accompanied by seriously disordered behavior; may be organic or psychogenic in origin; usually of sufficient seriousness to warrant treatment of the individual in an institution for the mentally deranged.

q

quartile: one of the three points, measured along the scale of a plotted variable, that divides the distribution into four parts, each including 25 percent of the frequency; thus, the first quartile (Q_1) is the 25th percentile, the second quartile (Q_2) is the median, and the third quartile (Q_3) is the 75th percentile.

quintile: one of the four points, measured along the scale of the plotted variable, that divides the distribution into five parts or intervals, each including 20 percent of the frequency; thus, the first quintile is the 20th percentile, the second quintile is the 40th percentile, etc.

quotient, achievement: an index of achievement calculated by dividing a student's achievement age by his mental age; hence essentially a ratio of scores on two kinds of tests, achievement and aptitude; presumably shows how the student's actual achievement compares with his potential achievement. *Syn.* **accomplishment quotient; attainment quotient; educational ratio;** *dist. f.* **quotient, educational.**

quotient, developmental (DQ): the ratio between a pupil's developmental age and the developmental age typical for a pupil of his chronological age.

quotient, deviation intelligence (DIQ): a measure of intelligence based on the extent to which an individual's score deviates from a score that is normal for the individual's age; it is a standard score, not a quotient, with an arbitrarily assumed mean, usually 100, and a standard deviation, usually 15 or 16, for all age levels. (Though a misnomer, the term *quotient* is still used here because of the common usage of the abbreviation *IQ.*) *See* **quotient, ratio intelligence.**

quotient, educational (EQ): the quotient obtained by dividing educational age by chronological age and multiplying by 100; shows a pupil's achievement as compared with the average achievement of pupils of his own age.

quotient, group intelligence: (1) an intelligence quotient obtained from a group intelligence test rather than from an individual intelligence test; (2) an aggregate intelligence quotient for a group obtained by dividing the sum of the mental ages by the sum of the chronological ages.

quotient, ratio intelligence (IQ): a measure for expressing level of mental development in relation to chronological age; obtained by dividing the mental age (as measured by a general intelligence test) by the chronological age and multiplying by 100; the chronological age is often fixed at a certain maximum, most commonly 16 years, when growth of intelligence due to maturation has been assumed to cease, so that a testee whose actual age was greater than this would still be assigned an age of 16 years; maximum chronological age for different tests varies from about 14 to 18 years; formerly a commonly used scale, now largely replaced by a standard score scale, the deviation intelligence quotient. *See* **quotient, deviation intelligence.**

quotient, social (SQ): the ratio between a pupil's social age, as obtained from such an instrument as the Vineland Social Maturity Scale, and his chronological age.

r

range, average: the deviations on both sides of the mean which, by common agreement, are near enough to the mean to be best represented by its characteristics; widely applied in such expressions as "children in the average range of intelligence."

readiness: willingness, desire, and ability to engage in a given activity, depending on the learner's level of maturity, previous experience, and mental and emotional set.

readiness, auditory: sufficient maturity in auditory discrimination for an individual to understand the meaning of words.

readiness, reading: attainment of the levels of interest, experience, maturity, and skills which enable the learner to engage successfully in a given reading task; often used to indicate the preparedness of a child for beginning formal reading instruction.

reading, applied: the utilization of attained reading skills in reading situations other than those contrived specifically for reading skill development.

reading, assimilative: a type of reading in which the reader concentrates on grasping the literal meaning without evaluation of or reflection on the significance of the ideas.

reading, associational: reading involving higher mental processes and bringing past experience to bear on the vicarious experience provided by reading.

reading disability, developmental: reading disability of individuals who exhibit no gross clinical findings related to psychological, physiological, and/or neurological disorders but who do have a basic defect in their manifest ability to integrate concepts with symbols.

reading disability, organic: reading difficulty of children who have abnormality in one or more areas subject to the classical neurological examination of cranial nerves, muscle tone and synergy, and deep and superficial reflexes.

reading disability, specific: failure to learn to read with normal proficiency despite conventional instruction, a culturally adequate home, proper motivation, intact senses, normal intelligence, and freedom from possible neurological defect.

reliability: (1) worthiness of dependence or trust; (2) (meas.) the accuracy with which a measuring device measures something; the degree to which a test or other instrument of evaluation measures consistently whatever it does in fact measure; *see* **coefficient of equivalence; coefficient of reliability.**

reliability, alternate-form: the closeness of correspondence, or correlation, between results on alternate (that is, equivalent or parallel) forms of a test; thus, a measure of the extent to which the two forms are consistent or reliable in measuring whatever they do measure, assuming that the examinees themselves do not change in the abilities measured between the two testings. *Syn.* **parallel-form reliability;** *see* **coefficient of reliability; equivalent forms; error, standard; reliability.**

reliability, retest: a method of estimating the reliability of a test by correlating the scores made by the same individuals on two administrations of the test.

reliability, scorer: evidence that the same test responses will be similarly scored by different scorers or by the same scorer at different times.

reliability, split-halves: reliability of a test or other variable measured by splitting it into comparable halves (usually the odd-numbered items and the even-numbered items), correlating the scores of the two halves, and applying the Spearman-Brown prophecy formula to estimate the correlation between the entire test (or other variable) and a comparable alternative form; properly applied only when the respective means and variances are equal and when the test is a power test rather than a speed test; *odd-even method of reliability, split-halves method,* and *split-test method* are also terms used to indicate reliability arrived at through this method.

resource room: (spec. ed.) an organizational plan in which children are registered with regular teachers who assume the major responsibility for their education; the resource room and resource room teacher are utilized as the need arises.

retardation, mental: a term referring to that group of conditions characterized by *(a)* slow rate of maturation, *(b)* reduced learning capacity, and *(c)* inadequate social adjustment, present singly or in combination, and associated with intellectual functioning which is below the average range, usually present from birth or early age; incorporates all that has been meant in the past by such terms expressing degrees of mental retardation as mentally deficient, borderline, feebleminded, high-grade, middle-grade, and low-grade, slow learner, mentally defective, moron, imbecile, and idiot. *See* **mental retardation, degree of.**

rheumatic fever: a chronic infection of the connective tissues of the body, affecting the joints, heart, and blood vessels; the specific cause of this disease is unknown, but in most cases it follows a streptococcus infection.

S

score, raw: a score obtained on a test as determined by the performance itself, to which no correction or modification of any kind has been applied other than the possible addition or subtraction of a constant score. *Syn.* **crude score; obtained score; original score.**

score, standard: a derived score on a test or other measuring device expressed in terms of the mean and standard deviation of the distribution of scores made on this test; this may be *(a)* a score in which the deviation from the mean is expressed as a multiple of the standard deviation, and the direction of the deviation by a positive or negative sign; known also as *z score, sigma score, standard measure,* or *sigma measure;* mean and range, sometimes taken as 5 and as 0 to 10, respectively, in order to eliminate negative signs; *(b)* a score that indicates the position of a given raw score in the group by fixing the mean of the distribution at 50 and expressing deviations from the mean in units of one-tenth the standard deviation (T score); or *(c)* a score derived by multiplying the standard score as defined in *a* by any constant and algebraically adding it to any other constant . *See* **deviation, standard.**

score, stanine: a normalized score on a nine-point one-digit scale in which the successive score values represent intervals of one-half of a standard deviation with the middle interval set at 5, and in which the proportion of examinees at each score is the proportion of the normal curve area corresponding to the interval; a type of derived score, used originally in testing in the U.S. Air Force; score 1 represented the lowest 4 percent, score 2 the next 7 percent, score 3 the next 12 percent, scores 5, 6, 7, 8, and 9 represented the next 17, 20, 12, 7, and 4 percents, respectively.

scores, scaled: (1) derived scores expressed, not in terms of age, grade, or percentile rank, but in terms of units of standard deviation of the scores for the original group (members of this group having been selected with a view to forming an average group); (2) any of several systems of scores (usually similar to standard scores) used in *(a)* articulating different forms, editions, and/or levels of a test or *(b)* developmental research.

screening: (1) the act or process of administering a *screen test* and applying its results; (2) (spec. ed.) the process of selecting certain pupils who appear to be disturbed and significantly deviant; not intended to take the place of diagnosis or classification; leads the teacher to refer to competent specialists those children who could benefit most from diagnosis.

spasm: a sudden, violent, involuntary, rigid contraction due to muscular action; when persistent, called tonic spasm; when characterized by alternate contraction and relaxation, called clonic spasm; attended by pain and interference with function, producing involuntary movement and distortion; the term is also used for a sudden but transitory constriction of a passage, canal, or orifice.

spasticity: (1) a central nervous disorder characterized by muscular incoordination often manifested by a dragging gait with the toes turned inward, awkward use of the hands and arms, and facial distortion, especially of the mouth; may be accompanied by severe speech disorder owing to incoordination of the speech mechanism; (2) the condition of being subject to spasms, that is, sharp muscular contractions, such as facial tics, whether as the result of a nervous disorder or of habit.

speech, spastic: the manner of speech characteristic of persons afflicted with bilateral paralysis, or Little's disease; the voice is weak and strained, articulation is defective, sometimes to the point of being completely unintelligible, and the act of speaking is often extremely difficult and labored.

speech training aid: any of the technical devices used to assist speech training, particularly with deaf or hearing-impaired individuals; the usual effect of such devices is to amplify or modify sounds presented to the trainee or to represent sounds visually. *Syn.* **voice training aid.**

spelling, finger: the use of the manual alphabet to spell out words for the deaf.

stuttering: speech characterized by anxious expectation of difficulty in emitting sounds or words, by reactions of unusual strain or tension, and by one or more of the following: repetition or prolongation of speech elements (sounds, syllables, words, or phrases), interjection of superfluous speech elements, silent intervals; sometimes used incorrectly to indicate the free, easy repetitions more or less characteristic of the speech of young children. (Stuttering is used synonymously with stammering, except by some writer who designate speech repetitions as stuttering and speech blocks or stoppages as stammering.)
stuttering, clonic: stuttering characterized mainly by the repetition of sounds or syllables, as in g-g-g-go or for-for-forward.
stuttering, interiorized: a form of stuttering behavior in which no visible contortions or audible abnormalities are shown but in which a hidden struggle, usually in the larynx or breathing musculature, is present; characterized by clever disguise reactions.

t

test, ability: a nontechnical term usually applied to tests designed to measure intelligence or aptitude; ordinarily used with various modifying adjectives, for example, mechanical ability test or musical ability test.
test, abstract-reasoning: (1) a test of one of the abilities measured in the differential-aptitude test battery; a power test used for prediction of success in secondary schools; (2) any test of abstract-reasoning ability; any test designed to measure capacity for solving problems requiring facility in the use of abstract symbols.
test, achievement: a test designed to measure a person's knowledges, skills, understandings, etc., in a given field taught in school, for example, a mathematics test or an English test. (In practice, an achievement test may include measures of several types of subject matter and may yield separate scores for each subject; such a test is usually called an *achievement battery.) Syn.* **achievement scale, educational test.**
test, anxiety: fear of taking examinations; unpleasant emotional reaction elicited by anticipation of a testing situation; may have an effect on the test performance of the subject.
test, articulation: an examination to determine the accuracy with which a person produces the various speech sounds singly or in connected speech; nonreaders' tests for young children and illiterates usually involve the naming of objects shown in a standard set of pictures; readers' tests usually involve the speaking of standard lists of words and the reading of prescribed phonetically edited sentences.
test, auditory: any test designed to assess ability to hear, either generally or in such specific abilities as pitch and rhythm discrimination.
test, nonverbal intelligence: a device used for measuring intelligence without the use of speech or language by examiner or subject; frequently tests requiring little speech or language are referred to as nonverbal; such tests indicate the ability to work efficiently to solve problems that do not involve verbal symbols.
test, projective: a global method of measurement of individual personality in which the presentation of a stimulus does not make manifest or only partially makes manifest the intent or nature of the response; the stimulus is usually unstructured and produces responses reflecting the person's own individuality; effective use requires much training.
test, visual-haptic: a battery of seven tests which determines the degree to which a person has a preference for using his eyes or his body as the intermediary for his experiences; whether he has a preference for observation or for tactile and kinesthetic experiences.
test, vocational interest: a series of questions concerning the objects or activities for which an individual indicates preferences; high scores are indicative of behavior patterns which would enable the individual to succeed in an occupational field.
test-wiseness: a subject's capacity to utilize the characteristics and formats of the test and/or the test-taking situation to receive a high score; logically independent of the examinee's knowledge of the subject matter which the items are supposedly measuring; includes knowledge of strategies in using time, avoiding error, guessing, reasoning deductively, and using cues and specific determiners.
therapist, occupational: professional personnel employed in hospital schools and/or classes and schools for crippled children; under medical direction emphasizes therapy to improve the use of the upper extremities.
therapist, physical: professional personnel employed in hospital schools and/or classes and schools for crippled children; under medical direction emphasizes therapy to improve the use of the lower extremities.
therapy, behavior: a therapeutic treatment of a pupil using special methods, materials, or environmental manipulation intended to facilitate behavioral modifications in the pupil and thereby improve his learning potential.
training, auditory: training in the recognition and interpretation of common sounds in the environment, such as gross sound, musical sounds, and speech; may be an integral part of the reading-readiness program or of the remedial reading program; becomes an important aspect in the education of children with limited hearing, for whom auditory training is usually undertaken with amplified sound through the use of hearing aids. *See* **acoustic method.**

V

validity: the extent to which a test or other measuring instrument fulfills the purpose for which it is used; usually investigated by an analysis of test content or by a study of relationships between test scores and criterion variables, independence of methods being a common denominator among the major types of validity excepting *content validity.*
validity, concurrent: (of a test) validity based upon correlation with a criterion variable that is measured at about the same time as the test is administered.
validity, construct: validity evaluated by investigating what qualities a test measures, that is, by determining the degree to which certain explanatory concepts or constructs account for performance on the test.
validity, content: validity demonstrated by showing how well the content of the test samples the class situations or subject matter about which conclusions are to be drawn; the test user wishes to determine how an individual performs at present in a universe of situations that the test situation is claimed to represent.
validity, criterion-related: validity demonstrated by comparing the test scores with one or more external variables considered to provide a direct measure of the characteristic or behavior in question; may take the form ofan expectancy table or, most commonly, a correlation relating the test score to a criterion measure; the test user wishes to forecast an individual's future standing or to estimate an individual's present standing on some variable of particular significance that is different from the test.
validity, curricular: evidence of test validity shown by agreement between test content and curricular content and test objectives and curricular objectives. *See* **validity, content.**
validity, predictive: (of a test) validity based upon correlation with a criterion variable that is not available until some time after testing (as, for example, school grades).
vision appraisal: the procedure of making a general examination and appraisal of an individual's vision through observation and the application of a battery of tests; frequently used as a screening technique by medical examiners in college health services; may include tests for central visual acuity, near vision, far vision, muscular balance, near point of convergence, visual field, and color vision as

well as observations on personal and family history and on the manifest condition of the eyes.

vision, peripheral: (1) visual sensation resulting from images falling on the outer portions of the retina (when the eyes are directed straight ahead, peripheral vision is perception on the extreme edges of the visual field); (2) mental interpretation of light stimuli falling on the retina outside the 10 degrees surrounding the macula; *syn.* **perimacular vision.**

visual acuity: clearness or keenness of vision, measured by the ability of the eye to resolve detail; quantitatively expressed in terms of *Snellen chart* and other measurements.

visual defect: an imperfection of vision resulting from impairment of the eye, the optic nerve, and/or the visual area in the brain; may manifest itself as a reduction of central visual acuity, contraction of the visual field, muscular imbalance, color blindness, or ametropia.

visual difficulty: a problem in seeing that interferes with the normal use of the eyes, especially in reading or writing.

visual disability: a handicap in or incapacity for specific visual tasks due to impairment of one or more of the visual functions.

BIBLIOGRAPHY

CHAPTER 1

Note, *Advocating for the Most Misunderstood Minority: Securing Compliance with Special Education Laws*, 14 Suffolk U.L. Rev. 505-44 (1980).

R. Allen, Legal Rights of the Disabled and Disadvantaged (1969).

Alschuler, *Education for the Handicapped*, 7 J. of L. and Educ. 523-38 (1978).

C. Atkinson & E. Maleska, The Story of Education (1962).

Baugh, *Federal Legislation on Equal Educational Opportunity for the Handicapped*, Idaho L. Rev. 65-87 (1978).

Bernstein, *Overview of Section 504: Affirmative Action in Employment for the Handicapped*, 9 Colo. L. Rev. 505-508 (1980).

Blakeley, *Judicial and Legislative Attitudes Towards the Right to an Equal Education for the Handicapped*, 40 Ohio St. L. Rev. 603-33 (1979).

R. Burgdorf & M. Burgdorf, The Legal Rights of Handicapped Persons: by Cases, Materials and Text. (1980).

R. Butts & L. Cremin, A History of Education in American Culture (1953).

Children's Defense Fund, Children Out of School in America: A Report by the Children's Defense Fund (1974).

Classification Materials (Center for Law and Education, Cambridge, MA: 1973 and 1976 Supp).

R. Conley, The Economics of Mental Retardation (1973).

L. Cremin, The American Common School (1951).

Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 Hastings L. Rev. 108-1127 (1973).

Montgomery, *The Education of Parochial School Handicapped Children and the Establishment Clause*, 8 J. of L. and Educ. 457-93 (1979).

Education for All Handicapped Children Act of 1975: In Need of an Advocate, 19 Washburn L. J. 812-29 (1980).

Engelhardt, *Education for All Handicapped Children Act: Opening the Schoolhouse Door*, 6 N.Y.U. Rev. of L. & Soc. Change 43-63 (1976).

Coultas, *Educational Malpractice and Special Education Law*, 55 Chi.-Kent L. Rev. 685-712 (1979).

Enforcing the Right to an 'Appropriate' Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103-27 (1979).

H. Good, A History of American Education (1962).

Halligan, *Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice*, 45 Mo. L. Rev. 667-707 (1980).

I. Howards, H. Brehm, & S. Nagi, Disability: From Social Problem to Federal Program (1980).

K. Hull, The Rights of Physically Handicapped People (1979).

United States Dep't of Educ., Interim Report of the Secretarial Task Force on Equal Educational Opportunity for Handicapped Children (1980)

Financing Education: Fiscal and Legal Alternatives (R. Johns, K. Alexander, & J. Forbis eds. 1972).

M. Katz, Class, Bureaucracy and the Schools (1975).

D. Kirp & M. Yudoff, Educational Policy and the Law (1974).

Kirp, *Schools as Sorters: Classification Practices and Constitutional Principles*, 12 U. Penn. L. Rev. 705-97 (1973).

Kirp, Buss, & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 Cal. L. Rev. 40-155 (1974).

Kula, *Right to Special Education in Illinois — Something Old and Something New*, 55 Chi.-Kent L. Rev. 649-83 (1979).

B. Ennis & P. Friedman, 1-3 Legal Rights of the Mentally Handicapped (1979).

L. Lippman & I. Goldberg, Right to Education: Anatomy of the Pennsylvania Case and its Implications for Exceptional Children (1973).

McClung, *The Legal Rights of Handicapped School Children*, 54 Educ. Horizons 25 (1975).

McClung, *The Problems of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children With Behavior Problems?*, 3 J. of L. & Educ. 491 (1974).

McClung, *School Classification: Some Legal Approaches to Labels, in* Classification Materials (Center for Law and Education 1973), *reprinted from* 14 Inequality in Educ. 17 (1973).

M. Mayer, The Schools (1961).

J. Meade, The Rights of Parents and the Responsibilities of Schools, Educators' Publication Service, Cambridge, MA (1973).

L. Miller & E. Gordon, Equality of Educational Opportunity (1974).

President's Committee on Mental Retardation, The Six Hour Retarded Child (1970).

Ramirez and Smith, *Federal Mandates for the Handicapped: Implications for American Indian Children*, 7 Exceptional Children 521 (1978).

Ray, *Legislation by Implication: The Exercise of Legislative Authority Under the 1978 Amendments to Section 504 of the Rehabilitation Act of 1973*, 68 Ky. L. J. 141 (1980).

Reynolds, *A Framework for Considering Some Issues in Special Education*, 28 Exceptional Children 367 (1962).

R. Rosenthal & L. Jacobson, Pygmalion in the Classroom (1968).

R. Rossmiller, J. Hale, & L. Frohreich, Educational Programs for Exceptional Children: Resource Configurations and Costs (1970)

R. Rossmiller, J. Hale, & L. Frohreich, Educational Programs for Exceptional Children: Resource Configuration and Costs (1970).

J. Rubin, Economics, Mental Health and the Law (1978).

A. Ruzicho, Handicapped Discrimination: How to Comply with the Rehabilitation Act of 1973 (1977).

Shepard, *Repudiation of Plato: A Lawyer's Guide to the Educational Rights of Handicapped Children*, 13 U. Rich. L. Rev. 783-845 (1979).

E. Singletary, E. Collins, & H. Dennis, Briefs on Litigation and the Rights of Exceptional Children, Youth and Adults (1978).

Special Education in Transition (R. Jones, & D. MacMillan eds. 1974).

Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71 (1978).

State, Regional and National Summaries of Data from the

1978 Civil Rights Survey of Elementary and Secondary Schools (Killalea Associates, Inc., April, 1980).

Symposium Proceedings of the Supreme Court Davis Decision: Implications for Higher Education and Physically Disabled Students (B. Schrauder & J. Villing eds. 1980).

E. Trudeau, Digest of State and Federal Laws : Education of Handicapped Children (1971).

Wald, *The Right to Education, in* Legal Rights of the Mentally Handicapped (B. Ennis & P. Friedman eds. 1973).

Weinstein, *Education of Exceptional Children*, 12 Creighton L. Rev. 987-1039 (1979).

F. Weintraub, A. Abeson, & D. Braddock, State Law and Education of Handicapped Children: Issues and Recommendations (1972).

B. Weisbrod, External Benefits of Public Education: an Economic Analysis (1964).

CHAPTER 2

A Handbook on Standardized School Testing (P. Nagle ed., Washington, D.C.: D.C. Citizens for Better Public Education, Inc. 1978).

T. Abel, Psychological Testing in Cultural Contexts (1973).

Abramson, *Influence of Examiner Race on First-Grade and Kindergarten Subjects; Peabody Picture Vocabulary Test Scores*, 6 J. Educational Measurement 241 (1969).

R. Allen & T. Jefferson, Psychological Evaluation of the Cerebral Palsied Person (1962).

American Psychiatric Association, Diagnostic and Stastical Manual of Mental Disorders (3rd ed. 1980).

A. Anatasi, Psychological Testing (4th ed. 1976).

S. Anderson, S. Ball, R. Murphy, & Assocs., Encyclopedia of Educational Evaluations (1975).

C. Anker, Teaching Exceptional Children: A Special Career (1978).

Baca, *Issues in the Education of the Culturally Diverse Exceptional Children*, 46 Exceptional Children 583 (1980).

Bailey & Harbin, *Nondiscriminatory Evaluation*, 46 Exceptional Children 590 (1980).

Bersoff, *Current Functioning Myth: An Overlooked Fallacy in I.Q. Assessment*, 37 J. Consulting & Clinical Psychology 393 (1971).

Bersoff, *Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in the Public Schools*, 39 Md. L. Rev. 27 (1979).

E. Brody & N. Brody, Intelligence: Nature Determinants, and Consequences (1976).

F. Brown, Principles of Educational and Psychological Testing (2d ed. 1976).

Campbell, *The Problem of Cultural Bias in Selection, in* The Executive Study Conference: Selecting and Training Negroes for Managerial Positions (1965).

R. Cancro, Intelligence: Genetic and Environmental Influences (1971).

Carmichael's Manual of Child Psychology (P. Mussen ed. 1970).

H. Chauncy & J. Dobbin, Testing: Its Place in Education Today (1963).

Children with Exceptional Needs: A Survey of Special Education (M. Lilly ed. 1979).

Cleary, *Test Bias: Prediction of Grades of Negro and White Students in Integrated Colleges*, 5 J. Educ. Measurement 115-24 (1968).

Thornton, *Constitutional Law — Limiting the Use of Standardized Intelligence Tests for Ability Grouping in Public Schools*, 51 N.C.L. Rev. 1564 (1973).

Constitutional Requirements for Standardized Ability Tests Used in Education, 26 Vand. L. Rev. 789 (1973).

L. Cronbach, Essentials of Psychological Testing (1960).

Deutsch, *The Disadvantaged Child and the Learning Process: Some Social Psychological and Developmental Considerations*, Education in Depressed Areas (H. Passow ed. 1963).

Deutsch & Brown, *Some Data on Social Influences in Negro-White Intelligence Differences*, 20 J. Soc. Issues 24 (1964).

W. Dick & N. Hagerty, Topics in Measurement: Reliability and Validity (1971).

Drew, *Criterion-Referenced and Norm-Referenced Assessment of Minority Group Children*, 11 J. Sch. Psychology 323 (1973).

R. Ebel, Measuring Educational Achievment (1965).

Ebel, *Educational Tests: Valid? Biased? Useful?*, 57 Phi Delta Kappan 83 (1975).

B. Anderson, & R. Stiggins, Educational Testing: Facts and Issues: A Layperson's Guide to Testing in our Schools (June, 1980)

Dick, *Equal Protection and Intelligence Classifications*, 26 Stan. L. Rev. 647 (1974).

Exploring Issues in the Implementation of P. L. 94-142: Developing Criteria for the Evaluation of Protection in Evaluation Procedures Protections (Research for Better Schools, Inc., May, 1979).

Deutsch, Fishman, Kogan, North, & Whitman, *Guidelines for Testing Minority Group Children*, 20 J. Soc. Issues Supplement 129 (1964).

R. Flaugher, Testing Practices, Minority Groups, and Higher Education: A Review and Discussion of the Research (1970).

Flaugher, *The New Definitions of Test Fairness in Selection: Developments and Implications*, 3 Educ. Researcher 13 (1974)

B. Gearheart & M. Weischahn, The Handicapped Child in the Regular Classroom (1976).

Gehlbach, *Individual Differences: Implications for Instructional Theory, Research and Innovation*, Educ. Researcher 8 (1979).

Green, *Tips on Educational Testing: What Teachers and Parents Should Know*, 57 Phi Delta Kappan (1975).

P. Guthrie & E. Horne, Measures of Infant Development: An Annotated Bibliography (Educational Testing Service, Head Start Test Collection, Princeton, Nj. 1971).

D. Hallahan & J. Kauffman, Exceptional Children: Introduction to Special Education (1978).

D. Hanson & D. Penrod, A Desk Reference of Legal Terms for School Psychiatrists and Special Educators (1980).

D. Harris, Children's Drawings as Measures of Intellectual Maturity (1963).

J. Hellmuth, The Disadvantaged Child (1967).

Hersch, *Effects of Referral Information on Testers*, 37 J. Consulting Clinical Psych. 116 (1971).

F. Hewett & S. Forness, Education of Exceptional Learners (2d ed. 1977).

Hilliard, *Cultural Diversity and Special Education*, 46 Exceptional Children 584 (1980).

N. Hobbs, Issues in the Classification of Children: A Sourcebook on Categories, Labels, and Their Consequences (1975).

N. Hobbs, The Futures of Children, Categories, Labels, and Their Consequences (1975).

R. Hurley, Poverty and Mental Retardation: A Causal Relationship (1969).

International Encyclopedia of the Social Sciences (D. Sills ed. 1968).

L. Kamin, The Science and Politics of I.Q. (1974).

Kendrick, *Test Bias, An Old Problem Revisited, in* Proceedings, Western Regional Conference on Testing Problems (1970).

S. Kirk, Educating Exceptional Children (2d ed. 1972).

S. Kirk & J. Gallagher, Educating Exceptional Children (3rd ed. 1979).

Kinne & Sternlof, *The Influence of Nonintellectual Factors on IQ Scores of Middle-and-Lower Class Children*, 42 Child Development 1989 (1971).

Kirp, *Schools as Sorters: Constitutional and Policy Implications of Student Classification*, 121 U. Pa. L. Rev. 705 (1973).

S. Klein, Psychological Testing of Children: A Consumer's Guide (1977).

E. Koppitz, The Bender Gestalt Test for Young Children (1964).

Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691 (1968).

Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children, 14 Colum. J. L. & Soc. Prob. 389-452 (1979).

H. Lyman, Tests Scores and What They Mean (2d ed. 1971).

McClung, *School Classification: Some Legal Approaches to Labels, in* Classification Materials (Center for Law and Education 1973).

Manual on Terminology and Classification in Mental Retardation (H. Grossman ed. 1977).

Marion, *Communicating with Parents of Culturally Diverse Exceptional Children*, 46 Exceptional Children 616 (1980).

J. Mercer, Labeling the Mentally Retarded (1973).

L. Miller, The Testing of Black Students (1974).

Mitchell, *Predictive Validity of the Metropolitan Readiness Tests and the Murphy-Durrell Reading Readiness Analysis for White and Negro Pupils*, 27 Educ. & Psychological Measurement 1127 (1967).

Murphy, *The Stranglehdold of Norms on the Individual Child*, 49 Childhood Education 343 (1973).

Murray, The Link Between Learning Disabilities and Juvenile Delinquency, Washington, D.C.: Dept. of Justice, LEAA (1976).

J. Nunnally, Tests and Measurements (1959).

Oakland, *Assessment, Education and Minority Group Children*, 10 Academic Therapy 131 (1974-75).

T. Oakland, Psychological and Educational Assessment of Minority Children (1977).

Parents' Guide to Understanding Tests, (New York, NY, CTB/McGraw-Hill 1976).

Neal, *Analysis of Response to Items on the Peabody Picture Vocabulary Test According to Race and Sex* 69 J. Educ. Research 265 (1976).

R. Potthoff, Statistical Aspects of the Problem of Biases in Psychological Tests (Chapel Hill, NC: Institute of Statistics Mimeo Series #479, University of North Carolina 1966).

President's Committee on Mental Retardation, The Six Hour Retarded Child (1970).

A. Rabin & M. Haworth, Projective Techniques with Children (1960).

M. Reynolds & J. Birch, Educating Exceptional Children (1977).

W. Rhodes & M. Tracy A Study of Child Variance: Vol. I Conceptual Models. Vol. II: Interventions (1972).

Race and Intelligence (K. Richardson & D. Spears eds. 1972).

Rock, *Motivation, Moderators, and Test Bias* 1970 Tol. L. Rev. 527.

R. Samuda, Psychological Testing of American Minorities (1975).

Samuel, Soto, Parks, Ngissah, & Jones, *Motivation, Race, Social Class, and I.Q.*, 68 J. Educ. Psychology 273 (1976).

Sattler, *Racial 'Experimenter Effects' in Experimentation, Testing, Interviewing, and Psychotherapy*, 73 Psychological Bull. (1970).

J. Sattler, Assessment of Children's Intelligence (1974).

Sattler, *A Review of Intelligence Test Modifications Used with Cerebral Palsied and Other Handicapped Groups*, 4 J. Special Educ. (1970).

Schwartz & Hanigan, *Evaluation of Examiner Bias in Intelligence Testing*, 76 Am. J. Mental Deficiency 262 (1971).

Segregation of Poor and Minority Children into Classes for the Mentally Retarded by Use of I.Q. Tests, 71 Mich. L. Rev. 121 (1973).

C. Senna, The Fallacy of IQ (1973).

Sherrer & Roston, *Some Legal and Psychological Concerns About Personality Testing in the Public Schools*, 30 Fed. B.J. 111 (1971).

J. Shur & P. Smith, Where Do You Look? Whom Do You Ask? How Do You Know? Information Resources for Child Advocates (1980).

A. Shuey, The Testing of Negro Intelligence (1966).

Sorgen, *Testing and Tracking in Public Schools*, 24 Hastings L.J. 1129 (1973).

Student Records, 22 Inequality in Educ. (1977).

B. Suran & J. Rizzo, Special Children: An Intergrative Approach (1979).

C. Telford, The Exceptional Individual (2d ed. 1979).

R. Thorndike, Educational Measurement (2d ed. 1971).

R. Thorndike Measurement and Evaluation in Psychology and Education (4th ed. 1977)

Torrance, Assessment of Disadvantaged Minority Group Children, 2 Sch. Psych. Dig. 3 (1973).

L. Tyler Intelligence: Some Recurring Issues (1969).

R. Tyler & R. Wolf, Crucial Issues in Testing (1974).

Vega & Powell, *Visual Defects and Performance on Psychological Tests*, 43 J. Negro Educ.127 (1974).

Weiner & Feldman, *Validation Studies of a Reading Prognosis Test for Children of Lower and Middle Socio-Economic Status*, 23 Educ. & Psych. Measurement 807 (1963).

Goldman & Hartig, *The Wisc May Not be a Valid Prediction of School Performance for Primary-Grade Minority Children*, 80 Am. J. Mental Deficiency 583 (1976).

M. Wisland, Psychoeducational Diagnosis of Exceptional Children (1974).

Zeigler, Abelson, & Seitz, *Motivational Factors in the Performance of Economically Disadvantaged Children on the Peabody Picture Vocabulary Test*, 44 Child Dev. 294 (1973).

CHAPTER 3

A Layperson's Guide to Testing in Our Schools (Portland, Ore, Northwest Regional Laboratory, 1980).

Administrative Rights of Handicapped Children to Educational Opportunities: Recent Developments in New York, 14 Colum. J.L. and Soc. Prob. 491-532 (1979).

W. Allinsmith & G. Goethals, The Role of Schools in Mental Health (1962).

SPECIAL EDUCATION

Almanza & Mosley, *Curriculum Adaptations and Modifications for Culturally Diverse Handicapped Children*, 46 Exceptional Children 608 (1980).

T. Bryan & J. Bryan, Understanding Learning Disabilities (1975).

W. Cruickshank, The Brain-Injured Child in Home, School, and Community (1967).

W. Cruickshank, J. Junakala, & J. Paul, The Preparation of Teachers of Brain Injured Children (1968).

Culhane & Curwin, *There's a Deaf Child in My Class*, 7 Learning 111 (1978).

M. Edelman, Portrait of Inequality of Black and White Children in America (1980).

H. Featherstone, A Difference in the Family: Life with a Disabled Child (1980).

Fuchigami, *Teacher Education for Culturally Diverse Exceptional Children*, 46 Exceptional Children 634 (1980).

B. Gearhart, Administration of Special Education (1967).

Gehlbach, *Individual Differences: Implications for Instructional Theory, Research, and Innovation*, 8 Educ. Research 8 (1979).

J. Gliedman & W. Roth, The Unexpected Minority: Handicapped Children in America (1980).

Godsave, *What Not to Do for the Hearing Impaired Child*, 7 Learning 117 (1978).

H. Grossman, Manual on Terminology and Classification in Mental Retardation (1973).

Guinaugh, *The Social Integration of Handicapped Children*, 6 Phi Delta Kappan 27 (1980).

P. Guthrie & E. Horne, Measures of Infant Development: An Annotated Bibliography (1971).

D. Hanson & D. Penrod, A Desk Reference of Legal Terms for School Psychiatrists and Special Educators (1980).

Hersh, *Effects of Referral Information on Testers*, 37 J. Consulting and Clinical Psych. 116-22 (1971).

N. Hobbs, Issues in the Classification of Children: A Sourcebook on Categories, Labels, and Their Consequences (1975).

R. Hurley, Poverty and Mental Retardation: A Causal Relationship (1969).

Spring Meyer, *Hyperactive Children and the Use of Psychoactive Drugs: Treatment or Coercive Behavior Management?*, 5 J. Contemp. L. 215-31 (1979).

International Encyclopedia of the Social Sciences (D. Sills ed. 1968).

Ireland, & Dimond, *Drugs and Hyperactivity: Process is Due*, 8 Inequality in Educ. 19 (1971).

D. Jordan, Dyslexia in the Classroom (1972).

S. Kirk, Educating Exceptional Children (2d ed. 1972).

Learning Disabilities: The Link to Deliquency Should Be Determined, But Schools Should Do More Now, (Washington, D.C., U.S. General Accounting Office 1977).

Levinson, *Right to a Minimally Adequate Education for Learning Disabled Children*, 12 Val. U.L. Rev. 253-87

McClung, *School Classification: Some Legal Approaches to Labels*, *in* Classification Materials (1973).

Manual on Terminology and Classification in Mental Retardation H. Grossman ed. (1977).

J. Mercer Labeling the Mentally Retarded (1973).

C. Moore & J. Morton, A Reader's Guide for Parents of Children with Mental, Physical, or Emotional Disabilities (1976).

J. Mordock, The Other Children: An Introduction to Exceptionality (1975).

C. Murray, The Link Between Learning Disabilities and Juvenile Delinquency (1976).

Olson, *Orienting the Blind*, 7 Learning 110 (1978).

Orleans, *Memorandum: First Thoughts on Southeastern Community College v. Davis*, 7 J.C. & University Law 263–277 (1980).

President's Committee on Mental Retardation, The Six Hour Retarded Child (1970).

President's Committee on Mental Retardation, A Very Special Child (1973).

Proceedings of the Conference on New Approaches to the Evaluation of Blind Persons (American Foundation for the Blind, Washington, D.C. 1968).

Putnam, *Books Can Introduce Your Class to the Mainstreamed Child*, 7 Learning 118 (1978).

S. Rappaport, Public Education for Children with Brain Dysfunction (1969).

C. Renefew, Speech Disorders in Children (1972).

R. Rosenthal & L. Jacobson, Pygmalion in the Classroom (1968).

J. Sattler, Assessment of Children's Intelligence (1974).

S. Segal, No Child is Ineducable (1974).

Segregation of Poor and Minority Children into Classes for the Mentally Retarded by Use of I.Q. Tests, 71 Mich. L. Rev. 1212-50 (1973).

Seventh Mental Measurements Yearbook (O. Buros ed. 1972).

Sherrer & Roston, *Some Legal and Psychological Concerns About Personality Testing in the Public Schools*, 30 Fed. B.J. 115 (1971).

Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 Wash. U.L.Q. 213-75 (1980).

Standards for Educational and Psychological Tests (American Psychological Association, Washington, D.C. 1974).

A. Strenio, The Testing Trap (1981).

C. Telford & J. Sawrey, The Exceptional Individual (1972).

Vega & Powell, *Visual Defects and Performance on IQ Tests*, 43 J. Negro Educ. 127–130 (1974).

Villa, *Specific Learning Disabilities*, 6 J.C. University Law 121 (1980).

P. Wender, Minimal Brain Dysfunction in Children (1971).

CHAPTER 4

W. Allinsmith, & Goethals, The Role of Schools in Mental Health (1962).

An Alternative Textbook in Special Education (B. Blatt, D. Biklen, & R. Bogdan eds. 1979).

S. Anderson, S. Ball, R. Murphy, & Assoc., Encyclopedia of Educational Evaluation (1975).

Baca, *Issues in the Education of Culturally Diverse Educational Children*, 46 Exceptional Children 583 (1980).

Bender, *Public Law 94-142: Challenging Individualized Education Programs Through Due Process Considerations*, 7 W. St. U.L. Rev. 137-57 (1980).

Jones, *Coercive Behavior Control in the Schools: Reconciling 'Individually Appropriate' Education With Damag-*

ing Changes in Educational Status, 29 Stan. L. Rev. 93 (1976).

Education - Denial of Publicly Funded Education to Handicapped Children for Period in Excess of One Hundred Eighty-Days Violates Education for All Handicapped Children Act, 18 J. Fam. L. 633-39 (1980).

Shibla, *Education: The Right of Retarded Children to Receive an Education Suited to Their Needs*, 77 Dick. L. Rev. 577-84 (1973).

Montgomery, *The Education of Parochial School Handicapped Children and the Establishment Clause*, 8 J. of L. Educ. 457-93 (1979).

Englehart, *Education for All Handicapped Children Act: Opening the School-House Door*, 6 N.Y.U. Rev. of L. Soc. Change 43-63 (1976).

Coultas, *Educational Malpractice and Special Education Law*, 55 Chi Kent L. Rev 685-712 (1979).

Enforcing the Right to an 'Appropriate' Education: The Education for All Handicapped Children Act of 1975, 92 Harv L. Rev 1103-27, (1979).

Black & Coyne, *Equal Educational Opportunity for the Handicapped - An Unfulfilled Promise*, 12 Loy. L.A.L. Rev. 683-719 (1979).

Frye, *Exceptional Child's Right to an Approved Private School Program in Pennsylvania: Practice and Problems*, 84 Dick. L. Rev. 417-45 (1980).

Fuchigami, *Teacher Education for Culturally Diverse Exceptional Children*, 46 Exceptional Children 634 (1980).

Functions of the Placement Committee in Special Education: A Resource Manual (National Association of State Directors of Special Education 1976).

B. Gearhart, Administration of Special Education (1967)

Gilhool & Stutman, Integration of Severely Handicapped Students, Philadelphia, PA: Public Interest Law Center of Philadelphia (no date).

Grisé, *Florida's Minimum Competency Testing Program for Handicapped Students*, 47 Exceptional Children 186-91 (1980).

Guide for Trainers: A Resource for Workshops on Developing Individual Education Programs (1977).

Guinagh, *The Social Intergration of Handicapped Children*, 12 Phi Delta Kappan 27-29 (1980).

R. Hagerty & T. Howard, How to Make Federal Mandatory Special Education Work for You: A Handbook for Educators and Consumers (1978).

Haggerty & Sacks, *Education of the Handicapped: Towards a Definition of an Appropriate Education*, 50 Temp. L.Q. 961 (1977).

Halligan, *Function of Schools, the Status of Teachers, and the Claims of the Handicapped: An Inquiry into Special Education Malpractice*, 45 Mo. L. Rev. 667-707 (1980).

Hendrickson, *Teachers Make Mainstreaming Work*, 7 Learning 104 (1978).

D. Springmeyer, *Hyperactive Children and the Use of Psychoactive Drugs: Treatment of Coercive Behavior Management?*, 5 J. Contemp. L. 215-31 (1979). D. Springmeyer

Wolfe, *Illinois State Subsidy of Special Education at Private Institutions Act*, 28 De Paul L. Rev. 769-84 (1979).

R. Jones. & D. MacMillan. Special Education in Transition (1974).

Keenan & Hammond, *Institutionalized Child's Claims to Special Education: A Federal Codification of the Right to Treatment*, 56 U. Det. J. of Urb. L. 337-404 (1979).

S. Kirk, Educating Exceptional Children (2d ed. 1972).

Kirp, *Schools as Sorters: Constitutional and Policy Implications of Student classification*, 121 U. Pa. L. Rev. 705-97 (1973).

S. Klein, Psychological Testing of Children. A Consumer's Guide with Special Emphasis on the Psychological Assessment of Children with Disabilities (1977).

Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, U. Ill. L.F. 1016 (1976).

Roach, *Least Restrictive Environment Section of the Education for All Handicapped Childrern Act of 1975: A Legislative History and an Analysis*, 13 Gonz. L. Rev. 717-79 (1978).

Legal Remedies for the Misclassification or Wrongful Placement of Educationally Handicapped Children, 14 Colum. J.L. & Soc. Prob. 389-452 (1979).

Levinson, *Right to a Minimally Adequate Education for Learning Disabled Children*, 12 Val. U.L. Rev. 253-87 (1978).

McCarthy, *Minimum Competency Testing and Handicapped Students*, 47 Exceptional Children 166-73 (1980).

McClung, *School Classification: Some Legal Approaches to Labels*, in Classification Materials (1973).

McClung, *Do Handicapped Children Have a Legal Right to a Minimally Adequate Education?*, 3 J.L. & Educ. 153-73 (1974).

McClung, *The Problem of Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?*, 3 J. Educ. 491-527 (1974).

McClung, *Competency Testing: Potential for Discrimination*, 11 Clearinghouse Rev. 439 (September, 1977).

McClung, *Are Competency Testing Programs Fair? Legal?*, 59 Phi Delta Kappan 397 (1978).

McClung & Pullin, *Competency Testing and Handicapped Students*, Clearinghouse Rev. 922 (March, 1978).

Marion, *Communication with Parents of Culturally Diverse Exceptional Children* 46 Exceptional Children 616 (1980).

Miller, *Handicapped Child's Civil Rights as It Relates to the 'Least Restrictive Environment' and Appropriate Mainstreaming*, 54 Ind. L.J. 1-28 (1978).

Miller, *Education for All Handicapped Act: How Well Does It Accomplish Its Goal of Promoting the Least Restrictive Environment for Education?*, 28 De Paul L. Rev. 321-50 (1979).

L. Miller & E. Gordon, Equality of Educational Opportunity (1974).

Moore & Morton, A Reader's Guide for Parents of Children with Mental, Physical, or Emotional Disabilities (1976).

Competency Testing, Special Education and the Awarding of Diplomas (National Association of State Directors of Special Education, Washington, D.C., February, 1979).

Olsen, *Minimum Competency Testing and the IEP Process*, 47 Exceptional Children 176-83 (1980).

Steinhart, *Procedural Guidelines for Implementing the Right to a Free Public Education for Handicapped Children*, 4 U. Balt. L. Rev. 136-56 (1974).

Progress Toward a Free Appropriate Public Education. A Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act, Washington, D.C.: U.S. Department of Health, Education and Welfare/Office of Education (January, 1979).

Pullin, *Mandated Minimum Competency Testing: Its Impact on Handicapped Adolescents*, 2 EEQ/Adolescents and Young Adults (1980).

Putnam, *Books Can Introduce Your Class to the Mainstreamed Child*, 7 Learning 118 (1978).

Ramirez and Smith, *Federal Mandates for the Handicapped: Implications for American Indian Children*, 44 Exceptional Children 521 (1978).

S. Rappaport, Public Education for Children with Brain Dysfunction (1969).

Ray, *Legislation by Implication: The Exercise of Legislative Authority Under the 1978 Amendments to Section 504 of the Rehabilitation Act of 1973*, 68 K. L.J. 141-83 (1980).

Reynolds, *A Framework for considering Some Issues in Special Education*, 28 Exceptional Children 367-70 (1962).

Van Zandt, *Right to a Meaningful Education in California: Should Dollars Make the Difference?*, 10 Pac. L.J. 991-1011 (1979).

The Right to Treatment and Educational Rights of Handicapped Persons: Lora v. Board of Education, 31 Stan. L. Rev. 807 (1979).

R. Rosenthal & L. Jacobson, Pygmalion in the Classroom (1968).

Rosewater, A., Minimum Competency Testing Programs and Handicapped Students: Perspectives on Policy and Practice, Washington, D.C.: Institute for Educational Leadership, George Washington University (June, 1979).

Ross & Weintraub, *Policy Approaches Regarding the Impact on Graduation Requirements on Handicapped Students*, 47 Exceptional Children 200-03 (1980).

Punke, *School Board Discretion in Providing Special Education*, 47 Conn. B.J. 182-210 (1973).

S. Segal, No Child is Ineducable (1974).

Shiman, *When Mainstreaming Comes In, Are the Poor Left Out*, 7 Learning 120 (1978).

Smith, *Right to an Appropriate Education: A Comparative Study*, 12 Ottawa L. Rev. 367-91 (1980).

Large, *Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975*, 58 Wash. U.L.Q. 213-75 (1980).

Standards for Psychiatric Facilities Serving Children and Adolescents (The American Psychiatric Association, Washington, D.C. 1971).

Stick, *The Handicapped Child Has a Right to an Appropriate Education*, 55 Neb. L. Rev. (1976).

Teacher Please Don't Close the Door: The Exceptional Child in the Mainstream (J. Jordan ed. 1976).

U.S. Facilities and Programs for Children with Severe Mental Illnesses: A Directory. (Compiled by the National Society for Autistic Children for the National Institute of Mental Health, Rockville, MD 1974).

Weintraub & Abeson, *Appropriate Education for All Handicapped Children*, 23 Syracuse L. Rev. 1056 (1972).

What Everyone Should Know About Educating Handicapped Children; A Guide to P.L. 94-142, (Channing L. Bete, Co., Inc. Greenfield, Mass. 1978).

J. Wilson, The Rights of Adolescents in the Mental Health System (1978).

Writing Individualized Assessment Reports in Special Education: A Resource Manual (National Association of State Directors of Special Education, Washington, D.C., 1978).

CHAPTER 5

A Handbook on Legal Rights of Developmentally Disabled People in Massachusetts (1978).

Administrative Rights of Handicapped Children to Educational Opportunities: Recent Developments in New York Law, 14 Colum. J. of L. Soc. Prob. 491-532 (1979).

Bender, *Public Law* 94-142: Challenging Individualized Education Programs Through Due Process Considerations, 7 W. St. U.L. Rev. 137-57 (1980).

Benjamin Blair, *Implementation of Education Laws Relating to Exceptional Children: The Maine Experience*, 11 Clearinghouse Rev. 449 (1977).

R. Burgdorf & M Burgdorf, The Legal Rights of Handicapped Persons: by Cases, Materials and Text (1980).

Developing the Compliance Monotoring Systems in Special Education: A Process Manual for State and Local Education Agencies (1977).

Dispute Settlement Procedural Safeguards: A Catalogue of Materials Related to Educational Rights of Handicapped Children (compiled by R. Brannon, E. Wright, and C. Swearingen 1980).

Due Process in Placement Hearings for the Mentally Retarded, 41 Geo. Wash. L. Rev. 1033-51 (1973).

L. Kotin & N. Eager, Due Process in Special Education: A Legal Analysis (1977).

Due Process in Special Education: Source Book (Research Institute for Educational Problems, Inc. 1977).

Due Process in Special Education: A Step-by-Step Resource Manual for Hearing Officers (National Association of State Directors of Special Education 1978).

Comment, *Educating New York's Handicapped Children* 43 Alb. L. Rev. 95-120 (1978).

Education for the Handicapped Law Report CRR Publishing Co.

Enforcing the Right to an 'Appropriate' Education: The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103-27 (1979).

Finn, *Advocating for the Most Misunderstood Minority: Securing Compliance with Special Education Laws*, 14 Suffolk U.L. Rev. 505-44 (1980).

Guide for Trainers: A Resource for Workshops on Training Impartial due Process Hearing Officers in Special Education (National Association of State Directors of Special Education 1978)

R. Hagerty & T. Howard, How to Make Federal Mandatory Special Education Work for You: A Handbook for Educators and Consumers (1978).

P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart and Weschler's The Federal Courts and the Federal System (1973).

Jones, *Accountability in Special Education*, 39 Exceptional Children 631-42 (1973).

Kirp, *Schools as Sorters: Constitutional and Policy Implications of Student Classifications*, U. Pa. L. Rev. 705-97 (1973).

Kirp, Buss, Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 Cal. L. Rev. 40-155 (1974).

D. Kirp & M. Yudoff Educational Policy and the Law (1974).

Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. Ill. L.F. 1016.

Kula, *Right to Special Education in Illinois - Something Old, and Something New*, 55 Chi.-kent L. Rev. 649-83 (1979).
New, 55 Chi.-kent L. Rev. 649-83 (1979).

1-3 Legal Rights of the Mentally Handicapped (B. Ennis & P. Freidman eds. 1979).

Marion, *Communicating With Parents of Culturally Diverse Exceptional Children* 46 Exceptional Children 616 (1980).

Moore & Bulman, *Recent Changes in the Law Affecting Educational Hearing Procedures for Handicapped*

Children, 7 BALT. L. REV. 41-69 (1977).

Van Zandt, *Right to a Meaningful Education in California: Should Dollars Make the Difference?* 10 PAC. L.J. 991-1011 (1979).

A. RUZICHO, HANDICAPPED DISCRIMINATION: HOW TO COMPLY WITH THE REHABILITATION ACT OF 1973 (1971).

Punke, *School Board Discretion in Providing Special Education*, 47 CONN. B.J. 182-210 (1973).

J. SHUR & P. SMITH, WHERE DO YOU LOOK? WHOM DO YOU ASK? HOW DO YOU KNOW? INFORMATION RESOURCES FOR CHILD ADVOCATES (1980).

H. TURNBULL, LEGAL ASPECTS OF EDUCATING THE DEVELOPMENTALLY DISABLED (1975).

APPENDIX A

CASE SUMMARIES

The following case summaries concerning education of the handicapped are compiled from Issues #1 through #16 of the Education Law Bulletin (March, 1975 - June, 1981). The Education Law Bulletin (ELB) is published on an irregular basis by the Center for Law and Education, Inc., 6 Appian Way, Cambridge, Massachusetts 02138 (617-495-4666). Subscriptions are provided free-of-charge to legal services programs and staff members. Others may purchase subscriptions.

This section of Special Education: A Manual for Advocates can be updated with each forthcoming issue of the ELB by inserting the appropriate case summaries at the end of this section.

The section numbers used here correspond to section numbers set forth in the topic outline of the ELB. They are:

5.	Abstention
15.	Attorney's Fees
25.	Class Actions
45.	Damages/Immunity

(continued)

98. Jurisdiction

110. Masters/Experts/Receivers

125. Residence

140. Special Education/Special Needs

- 140A. Priorities and Timelines for Service
- 140B. Identification and Evaluation
- 140C. Placement and Programming
  - 140C.1 Least Restrictive Environment
  - 140C.2 Individualized Education Programs (IEP)/ Appropriateness
  - 140C.3 Extracurricular Activities
  - 140C.4 Discipline of Handicapped
  - 140C.5 Right to Year-Round Schooling
  - 140C.6 Related Costs
- 140D. Payment of Costs for Special Education
- 140E. Procedural Protections (See also §175)
- 140F. Judicial Review
  - 140F.1 Exhaustion of Administrative Remedies
  - 140F.2 Private Right of Action
  - 140F.3 Standards of Review
  - 140F.4 Right to Compensatory/Punitive Damages (see also §45)
  - 140F.5 Class Certification (See also §25)
- 140G. Physical Accessibility

155. Student Records

(continued)

175. Student Rights/Procedural Due Process
    175A. Notice/Right to a hearing, Nature of Hearing
    175B. Impartial Decisionmaker
    175C. Remedies
185. Substantive Due Process
208. Treatment (Right to)

5. Abstention

See Gary B. §140C.6; Monahan §140F.3.

5.5 Accountability/"Educational Malpractice"

Greth v. Dade County School Board, C.A. No. 79-9401, Circuit Court, 11th Judicial Circuit, Dade County, Florida, Complaint, ____, 1979 (Clearinghouse #29,907A)

Action based upon student's alleged wrongful classification and education from 1975-1980 as "emotionally disturbed" and "emotionally retarded", rather than learning disabled. Plaintiff alleges that the erroneous placement resulted from "inadequate, insufficient and inaccurate testing and procedures...." The complaint further alleges that defendants, later, were wilfull and malicious in continuing the placement, with knowledge that it was erroneous. Plaintiffs seek $1,000,000 in damages, on each of two claims, for denial of "five years' learning opportunity," "ridicule," private school tuition, time spent by the plaintiff-parents in tutoring their son, and emotional distress experienced by the plaintiff-mother.

Hoffman v. Board of Education of City of New York, 410 N.Y.S. 2d 99 (App. Div., Sec. Dept., 1978), affirming, Calendar No. CC 2455, Supreme Ct., Queens County, Jury Verdict, 10/21/76

Appeal from a judgment of $750,000, entered after a jury trial, on the theory that plaintiff had been negligently and erroneously retained in a class for mentally retarded pupils for 11 years. Plaintiff was given at age five a Stanford-Binet Intelligence Test by a clinical psychologist employed by defendant, scoring 74, one point below the cut-off score for placement in regular classes. He had at the time and continued to have a very severe speech problem. (At age four, plaintiff had scored within the normal range on a nonverbal intelligence test.) The written report prepared by defendant's clinical psychologist stated in part: "Also his intelligence should be re-evaluated within a two-year period so that a more accurate estimation of his abilities can be made." However, plaintiff was not given another I.Q. test until he was 18 years old and enrolled in an Occupational Training Center for the retarded. This test indicated that his intelligence was within the normal range. Plaintiff scored well below grade level on achievement tests given each year during the period of his enrollment in classes for the mentally retarded in the New York City schools. None of plaintiff's teachers or his mother requested that his I.Q. be retested. *Rulings* (in affirming 3-2 as to liability, with all five judges agreeing that a new trial must be conducted on the issue of damages unless plaintiff agrees to a reduction in damages to the amount of $500,000): (1) Negligence is established by the failure of defendant's employees to follow the earlier recommendation for reevaluation. (109) (2) "Defendant's affirmative act in placing plaintiff in a CRMD class initially (when it should have known that a mistake could have devastating consequences) created a relationship between itself and plaintiff out of which arose a duty to take reasonable steps to ascertain whether (at least in a borderline case) that placement was proper. ...We need not decide whether such duty would have required 'intelligence' retesting (in view of plaintiff's poor showing on achievement tests) had not the direction for such retesting been placed in the very document which asserted that plaintiff was to be placed in a CRMD class." (109) (3) Damages for "psychological and emotional injury" may be recovered even in the absence of physical injury or contact. (109-10) There is no basis for applying a rule different than the one applicable to personnel of municipal hospitals. (110) (4) This case is different than those involving " 'educational torts' for nonfeasance...." (110) (5) This case did not require the jury or judiciary to decide educational policy issues because the standard of care applied was that developed by defendant's employee. Distinguishing *James* v. *Board of Education of City of New York*, 397 N.Y.S. 2d 934 (1977) (6) The dissenters argued, in part, as follows: (a) the use of the term "re-evaluate" by the clinical psychologist did not refer to testing; the plaintiff was regularly "reevaluated" by his teachers and by achievement testing and no basis for giving another I.Q. test emerged; it was not consistent with the *James* case, *supra*, to submit to a jury the question of whether the school board had a duty to periodically retest plaintiff's I.Q. (111-17); (b) the majority decision is inconsistent with the dismissal of an educational malpractice action in *Donahue* v. *Copiague Union Free School District*, 407 N.Y.S. 2d 874 (1978) as plaintiff had a speech problem when he entered school, he was left no worse off (117-19).

Note: One of the principal problems which plaintiff's counsel have faced in educational malpractice cases is that of establishing a standard against which educators' conduct may be measured. See *Peter Doe* v. *San Francisco Unified School District*, 131 Cal. Reptr. 874 (S. Ct., Calif., 1976). Here, the court utilizes as a standard the recommendation of the school psychologist for reevaluation. Placement of students in classes for the retarded based upon one test score was quite common. Query whether other cases should be distinguished, if the existing literature in the field recognized the inappropriateness of such reliance on one test score.

Hoffman v. Board of Education of the City of New York,
424 N.Y.S.2d 376 (Ct. of Appeals of N.Y. 1979)
3 EHLR 551:382 Clearinghouse
#25,698

Appeal from intermediate appellate court's reversal of a trial court judgment in favor of plaintiff, a former student in defendant's schools, who alleged that the school district was negligent in its initial educational evaluation of him, which resulted in inappropriate placement in special education, and failure to reevaluate. Rulings (in affirming dismissal of the action): (1) Although plaintiff does not so state, his action sounds in "educational malpractice," an attack upon the professional judgment of the board of education and its employees. (p. 378) (2) A cause of action for educational malpractice, although quite possibly cognizable under traditional notions of tort law, should not, as matter of public policy, be entertained by the courts of this state (citing Donohue v. Copiague Union Free School District, 418 N.Y.S.2d 375, 391 N.E.2d 1352; (pp. 378-79) (3) It is well settled that the "courts of this state may not substitute their judgment, or the judgment of a jury for the professional judgment of educators and government officials actually engaged in the complex and often delicate process of educating the many thousands of children in our schools. . .the courts will intervene in the administration of the public school system only in the most exceptional circumstances involving 'gross violations of defined public policy.'" No such circumstances are present here. (p. 379) (4) The policy considerations articulated in Donohue, supra, apply regardless of whether the allegations concern the failure to educate properly, nonfeasance, or affirmative acts of misfeasance. (p. 379) (5) "The court system is not the proper forum to test the validity of the educational decision to place a particular student in one of the many educational programs offered by the schools of this state. In our view, any dispute concerning the proper placement of a child can best be resolved by seeking review of such professional judgment through the administrative process provided by [state] statute." (p. 380) (6) One judge, dissenting: this case involves not "educational malpractice," but discernible affirmative negligence on the part of the board of education in failing to carry out the recommended re-evaluation." (p. 380)

Pierce v. Board of Education of City of Chicago,
370 N.E.2d 535 (S.Ct.Ill., 1977) reversing 358
N.E.2d 67 (Ill.App., 1976) (Bulletin, p. 573)

Appeal of decision reversing lower court dismissal for failure to state a cause of action. The complaint alleged that student-plaintiff suffered from a specific learning disability; that defendant board of education was advised of this fact by privately retained physicians; and that despite medical recommendations that plaintiff be transferred from regular to special education classes, defendant failed to either transfer the plaintiff or to undertake its own testing and evaluation of him. The complaint further alleged that as a result of the defendant's refusal to place plaintiff in a special education class, he suffered severe and permanent emotional injury for which damages were warranted. Plaintiff's complaint was based on the Board's having breached a duty owed to him to place him in a special education facility under the education clause of the state constitution and a statutory provision directing school boards to provide special education facilities for handicapped children. (Ill.Const., Art. 10, §1; Ill.Rev.Stat. 1971, ch. 122, par. 14-4.01). Rulings (in reversing): (1) Art. 10, §1, Ill.Const., is not self-executing and does not impose a duty on boards of education to place students in special education classes. Its goal of "the educational development of all persons to the limits of their capacities" is a statement of general philosophy, not a mandate that certain means be provided in any specific form. (536) (2) Plaintiff's reliance on the above-cited statutory provision is misplaced. Section 14-8.01, School Code (I.R.S. 1975, ch. 122, par. 14-8.01) provides that the State Board of Education, not the local school board, is responsible for determing the eligibility of children for special education. (536-37) (3) Where the complaint fails to allege compliance with administrative procedures established by regulation for review of defendant board's failure or refusal to admit plaintiff to special education classes, plaintiff has not exhausted available administrative remedies. (537)

Pope v. Crawford Central School District, C.A. No. 60, Sept. Term, 1979, Court of Common Pleas, Crawford County, PA., Complaint, 12/10/79 (Clearinghouse #29,903A)

Educational malpractice action concerning treatment of student having special needs during the period of his enrollment in school system from September 1968 until June 1977. The complaint alleges, in part, that plaintiff "is unable to read or write or make change, although he has the capacity to do so...," that plaintiff's mother was not aware of his classification as an "exceptional child" until after his graduation, that defendants' treatment of plaintiff did not comport with governing laws and regulations, and that defendants did not address plaintiff's "educational dysfunction which was related to significant perceptual loss." The complaint seeks an award of money damages.

Torres v. Little Flower Children's Services, Index No. 07875/77 Supreme Court, New York County, Verified Complaint, 4/77 (Clearinghouse # 26,467A)

Educational malpractice action seeking compensatory and punitive damages and "readmi ssion into foster care under terms agreeable to the plaintiff so as to provide for the plaintiff's care, education and vocational training." The plaintiff, age 19, "is presently incapable of reading or writing, either in English or any other language." He was under the care and supervision of a child care agency from June, 1964 until July, 1975. The complaint alleges that the employees of that agency failed to diagnose the cause of the plaintiff's illiteracy, to revise the services afforded him, or, after 1972, to employ the results of an independent evaluation which suggested a method for teaching plaintiff to read. The complaint alleges that "[h]ad defendants promptly evaluated plaintiff's obvious reading problem, and then obtained the appropriate services which were and are available to correct it, plaintiff would have learned a skill, could have been trained to read, and would not be illiterate and unskilled today." The defendants are the foster care facility, several of its employees, and state officials with responsibility for children placed in foster care facilities. The complaint sets forth claims based upon negligence, plaintiff's asserted rights as a third party beneficiary of the contact between the State and the child care organization, and procedural due process.

Notes: (1) On September 9, 1977, the court ordered the Board of Education and Chancellor of the New York City system "to furnish Torres, insofar as is feasible, with appropriate evaluation and special program services in accordance with the provisions of section 4402 of the Education Law until petitioner has reached his 21st birthday (E.D. sec. 4401(1))." (Clearinghouse # 26,480A). Subsequently, a contempt petition was filed, alleging non-compliance with the foregoing order. On June 8, 1978, the court ordered "that unless by June 30, 1978, the respondents enroll the petitioner in a program where he may learn to read and write, either through OVR or under section 4604 of the Education Law (continuing adult education), the petitioner may enroll in a private progam of his own choosing." The court further provided that defendants would be responsible for the cost of such a program, and a private program in which plaintiff had been enrolled, upon proof of his indigency. (Clearinghouse #26,480B) (2) On March 22, 1978, plaintiff filed a second, similar action which his counsel characterize as "seeking education now." See Torres v. The City of New York, Index No. 04906/78, Supreme Court, New York County (Clearinghouse #26,479A). A letter from plaintiff's counsel states that this second case resulted in the contempt petition.

15. Attorneys Fees

See Allen §140C.2; Anderson 140C.2; Springdale §140C.2.

25. Class Action

Adashunas v. Negley, No. 80-1075 (C.A. 7, 8/ /80) 3 EHLR 552:187

Class action brought on behalf of all children in Indiana entitled to public education who have learning disabilities and are not receiving special instruction as to guarantee them a minimally adequate education. Plaintiffs sought to have the court certify a defendant class composed of the superintendent and school board members of each Indiana public school corporation that fails to provide access to a minimally adequate education suited to the needs of all students. Before the district court's ruling, one of the named plaintiffs (J. Adashunas) was found to be learning disabled and placed in an appropriate program and another named plaintiff was found not to be learning disabled. The district court therefore granted defendants summary judgment against Adashunas in his claim for injunctive and declaratory relief and denied class certification. Plaintiff appeals. Rulings (in affirming denial of injunctive relief and class certification): (1) "The fact that much of the plaintiff's individually sought relief was denied on the basis of mootness does not disqualify the plaintiff from appealing the denial of certification of the class." (p.552:189) (2) "[T]he district court correctly concluded that the Rehabilitation Act does provide the handicapped with affirmative rights, does create a private cause of action and does not require exhaustion of administrative remedies." (p.552:189) (3) "In order to state a class action claim upon which relief can be granted, there must be alleged at the minimum (a) a reasonably defined class of plaintiffs, (b) all of whom have suffered a constitutional or statutory violation, (c) inflicted by the defendants. The complaint as amended in this case is seriously deficient in all three respects insofar as the class action is concerned." (p.552:189). (4) Since learning disabled children are very difficult to identify and since the alleged class is composed of "children with learning disabilities, who are suspected to exist on the basis of estimates of the prevalence of learning disabilities, the court concludes that "the proposed class of plaintiffs is so highly diverse and so difficult to identify that it is not adequately defined or neatly ascertainable. Hence, for that reason, the plaintiff class cannot be maintained." (p.552:190). (5) "[S]ince the proposed class is so amorphous and diverse, it cannot be reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief. If the conceived injury is abstract, conjectual or hypothetical as here, instead of real, immediate or direct, the complaint fails to cite an actual case or controversy under Article III of the Constitution." (p.552:190) (6) "Because of the diverse nature of the relation between handicapped children and local educational agencies, it is difficult to imagine any case where a defendant class of such agencies would be appropriate." (pp. 552:190-1). (7) The standard of review of the denial of class certification is whether the court abused its discretion. We cannot say that the court here abused its discretion."(p.552:191)

25. Class Actions

See Anderson §140C.2; Mason §140C.2; Tina A. §140E.
See also §140.F.5

45. Damages/Immunity

See M.R. §140C.2.

62. Drugs (administration to students)

Benskin v. Taft City School District, No. 136795,
Superior Ct., Calif., Settlement Agreement, 5/16/80.

Action by students and former students and their parents charging that defendant school district and its employees, including the school physician, had unlawfully urged parents to give their children the behavior-modification drug Ritalin to control alleged hyperactive behavior. In addition, the parents allege that they were not fully informed of the drug's dangers. Finally, some plaintiffs allege that they were placed in classes for the mentally retarded without their parents' knowledge or consent. Settlement agreement: (1) The school district's liability insurance carriers will distribute a total of $210,000 to the individual plaintiffs. (p.7) (2) The district will inform the parents of every student enrolled in the district that no student will be excluded or removed from school or transferred as a result of a parent's refusal to consent to the student's being placed on any medication.(p. 8) (3) All certified staff and nurses in the district will be notified of the district's policy of avoiding encouragement or support for drug use for behavior modification. (p. 8) (4) Parents of children currently being administered Ritalin during the school day will be informed of the harmful side effects of the drug. (p. 9) (5) The district will continue its inservice programs for teachers and administrators on dealing with discipline problems and on the use of medication to control such problems. (p. 9) (6) No school physician employed by the district will prescribe behavior-modification drugs. (p. 11) (7) No student will be placed in a class for the educable mentally retarded without the fully informed consent of the parents. (p. 12) (8) No district employee will be permitted to prevent a student in need of special education from being placed in a class for the educationally handicapped if the student's score on an individual standardized intelligence test falls two or more standard deviations below the norm. (p. 12).

98. Jurisdiction

See Gary B. §140C.6; and Medley §140F.1.

110. Masters/Experts/Receivers

Jose P. v. Ambach, Civil No. 79 C 270 (E.D.N.Y. 5/16/79)
3 EHLR 551:245 Clearinghouse #25,954

Class action brought on behalf of all handicapped children living in New York City who are allegedly being deprived of a free appropriate public education due to defendants' failure to promptly evaluate and place these handicapped children in appropriate educational programs. Plaintiffs seek declaratory and injunctive relief directing defendants to evaluate and place plaintiffs in appropriate programs within the required time requirements. Pursuant to the regulations promulgated by the New York State Commissioner of Education, a child must be evaluated within 30 days of his identification as a handicapped child and be offered appropriate placement within 30 days thereafter. See 8 NYCRR §200.5(d). Defendants concede the propriety of class certification but oppose certification on grounds that plaintiffs have failed to exhaust their administrative remedies and that the named plaintiffs have been evaluated and offered placement and therefore their claims are moot. Rulings (in granting class certification and injunctive relief): (1) The available administrative remedies are clearly inefficacious as to plaintiffs' case as the Commissioner of Education conceded that he would be unable to expeditiously process the appeals of all the members of plaintiffs' class should they seek administrative review. Also, previous attempts at exhaustion have been ineffective. (See Reid v. Board of Education, 453 F.2d 238 (2nd Cir. 1971)). Therefore, certification of a class action is appropriate. (2) This action is not moot as "even assuming arguendo that plaintiffs' individual claims are moot, the claims of the remainder of the class continue to present a live controversy." Dismissal for mootness would render defendants' actions capable of repetition yet evading review." (p. 551:247) (3) This action meets the requirements of a class action under Rule 23(a) and (b)(2). With the number of children involved in the thousands, the class is so numerous as to make joinder impracticable. Plaintiffs' allegations of deprivation of rights secured by P.L. 94-142, Section 504 and the New York Education Law §§4401 et seq. are typical of and common to the claims of the class. The named plaintiffs and their legal representative will fairly and adequately represent the interests of the class. Finally, in view of the nature of the alleged deprivation, injunctive relief may be needed with respect to the class as a whole. (p. 551:247) (4) The class to be certified consists of "all handicapped children between the ages of five and twenty-one living in New York City whom the Board has been notified, pursuant to 8 NYCRR §200.5(d), may be handicapped and who have not been evaluated within thirty days or placed within sixty days of such notification." (p. 551:247) (5) Due to factors which are not in the control of the Board such as the "difficulty in initially locating handicapped children, failure of parents to bring children to scheduled appointments, frequent rejection of offered placements by a child's parents, and difficulty in recruiting adequate qualified teaching and administrative personnel and obtaining sufficient classroom space. . .the court finds this to be the type of exceptional case requiring appointment of a special master under F.R.C.P. 53." (p. 551:247). (6) "Since it has been established that defendants have failed to meet their statutory duties in providing educational services to handicapped children in the City of New York, it is proper to award the costs of the master and the supportive services he requires against the defendants. . ." (p. 551:247) (7) The master will be "permitted to consult informally with the parties and with outside experts and others and to receive materials not in evidence." (p. 551:247) (8) Proceedings before the master may be conducted informally without counsel if desired. However, all meetings must be made known to all counsel by records of them kept by the master. (p. 551:247) (9) "The master shall evaluate the plans promulgated by the Board and shall make such recommendations as he deems appropriate as to what decree the court should enter to provide the requisite public education to handicapped children in the City of New York." (p. 551:247) (10) The master shall have access to all information on the school system and services that may be necessary to prepare the report. (p. 551:247) (11) "Any party or person may apply to this court on notice to the master and parties for a protective order against any activity of the master." (p. 551:248).

Halderman §140C.1; Allen §140C.2; P-1 §140C.2; Frederick L. §140B.

125. Residence

In re Juvenile Case #1089 §140D.

140A. Priorities and Timelines for Service

Frankel v. Commissioner of Education, 480 F.Supp. 1156
(S.D.N.Y. 1979)

Plaintiffs allege that state and local educational officials failed to make a timely and proper identification of their son's emotional disabilities, and that this failure resulted in placement in a private residential out-of-state school, and that defendants should be liable for the costs of the private placement. Plaintiffs, who allege violations under both state and federal special education laws (P.L. 94-142, 20 U.S.C. §§1401 et seq.), had exhausted all state administrative hearings to no avail. Rulings (in denying motion to dismiss): (1) The fact that plaintiffs' claim was under consideration on appeal at the time P.L. 94-142 became effective in 1976 does not defeat their claim under that statute according to the tests for retroactive applicability set forth in Bradley v. Richmond School Board, 416 U.S. 696 (1973). (p. 1159) (2) The legislative history of P.L. 94-142 indicates that the issue presented by plaintiffs is one of "great national concern," making retroactive applicability appropriate. (p. 1159) (3) The fact that no right of defendants was affected by P.L. 94-142 also makes retroactive applicability appropriate. (p. 1159) (4) This is not a situation in which the change in the law would have a significant prejudicial impact on existing rights by imposing new obligations on a party without notice or an opportunity to be heard since defendants' obligation to provide education and procedural protections for handicapped students existed prior to the enactment of P.L. 94-142 (p. 1159) (5) The court has jurisdiction under 20 U.S.C. §1415. (p. 1160) (6) Plaintiffs have stated a claim upon which relief can be granted; provisions of New York statutes requiring state approval of out-of-state residential placements cannot bar a challenge when such approval was denied since the denial of such a challenge would deny fundamental rights to appropriate identification and placement and procedural protections (p. 1160).

Rainey v. Tennessee Department of Education, C.A. No. A-3100,
Chancery Ct., Davidson Cty., Memorandum, 1/28/77
(Clearinghouse #11,585C)

Further proceeding in action seeking enforcement of Tennessee laws requiring provision of sufficient educational services for handicapped students. See T.C.A. §§49-2912-49-2959. A previous court order required defendant state officials to submit a plan of implementation to be effective in 1976-77. The plan submitted by defendants "did not provide for implementation...." As of October, 1976, more than 5000 handicapped pupils in Tennessee were not appropriately served. Although the cost of implementing a July, 1974, court decree would be $20 million, the Commissioner of Education sought $4 million in additional funds. Rulings (in granting further relief): (1) The defendants are in contempt. (p. 4) (2) The defendants shall file by March 1, 1977, a plan which "shall describe programs required to service all children, the programs currently available, and the added costs for implementation." (p. 5) (3) The plan shall be implemented by July 1, 1977. "From and after that date, the defendants shall be enjoined from expending money for the operation of a public school system in this state unless the plan to be submitted is incorporated into the operation of the department of education and fully pursued to implement the consent decree." (p. 5) This relief is not barred by sovereign immunity or the separation of powers. (pp. 5-9) (4) The defendants are not required to seek appropriations or raise additional monies. However, "if the State intends to have a free public school system, it cannot discriminate against a small and politically powerless minority." (p. 9)

Rainey v. Tennessee Department of Education, Appeal No. ______, Tenn. App., 12/2/77

Appeal, in action seeking enforcement of Tennessee laws concerning educational services for handicapped students, from order entered March 9, 1977, enjoining defendants from expending money for the operation of public school system, after July 1, 1977, unless a remedial plan submitted to the trial court was incorporated into the operation of the Department of Education and fully pursued to implement a 1974 consent agreement. (Bulletin, pp. 152, 339) Rulings (in remanding): (1) The issuance of the above injunction is an inappropriate remedy. (p. 10) (2) If the injunctive relief is put into effect, the result would be to deprive completely 2,988 handicapped children who are partially excluded from education (i.e., enrolled in school, but not receiving certain special education services) and to deprive several hundred thousand school children from the educational facilities of the State pending compliance with the court's orders by defendants. Hence, "the injunctive relief granted would create a hazard substantially greater than any injury that is suffered by reason of the failure of the Department of Education to put the prior decree into effect...." (pp. 10-11) (3) The lower court's finding of contempt was correct. (p. 11) (4) A "...remedy [here] would be more appropriately applied to individual officials charged with responsibility of administering the educational program of the State, having in mind the extent of their respective powers and authority as well as the limitations thereon under the statutes and legislative appropriations." (p. 12) (5) As much time has passed since the entry of orders below, the matter should be remanded for further proceedings. (p. 12)

In the Matter of Appeal of Reid, et al., No. 9499, New York State Education Department, Order of the Commissioner of Education, 9/2/77

Appeal by petitioners alleging that the needs of handicapped children continue to be unmet by respondent, members of New York City Board of Education, and seeking further relief. In 1973, an order was issued by the Commissioner directing respondent to take certain affirmative steps to meet their statutory duty of providing an appropriate education for handicapped students in the New York City public schools. On June 30, 1977, an interim order was issued requiring respondent to operate its evaluation and placement units during the 1977 summer months. Petitioners' appeal is opposed by the respondent board members who argue substantial compliance, evidence of progress, and cite the fiscal plight of New York City and attendant constraints upon the City School District as obstacles to full compliance. Findings and Order (granting further relief to petitioners): (1) Though arguing that their efforts have been reasonable and adequate in placing diagnosed students in appropriate educational programs, the respondents concede that waiting lists exist. Such partial compliance is not sufficiently responsive to the deficiencies found to exist, and respondents must promptly place all students found to need special education programs. (2) Where the board of education cannot provide a suitable public school program, it must contract with a private institution. (3) Much delay exists in placement following diagnosis and an enormous number of children with special needs resulting from handicapping conditions are currently unserved. (4) Respondents are accordingly required to continue in private school placement all students currently enrolled in private schools unless the committee on the handicapped finds specifically that such placement is not suitable for a particular student. (5) Though there has been an appreciable decline in the number of students, particularly those categorized as emotionally disturbed, who receive home instruction, respondents must take further steps to provide more permanent and proper programs for this specific group of students. (6) Current indications are that 5,000 students are awaiting initial evaluation and that respondents are inadequately dischargingtheir statutory duties. (7) Respondents' closing of the evaluation and placement units during the 1976 summer months was totally inconsistent with any serious intent to eliminate waiting lists and expeditiously process evaluations. (8) Respondents should adopt personnel policies that will effectively maximize the productivity of the evaluation and placement units in those times during the school year when referrals are greatest. (9) Although the 1973 order required respondents to study the needs of all handicapped secondary students and to submit a plan to meet their needs, respondents have submitted a plan to examine the needs only of the emotionally disturbed and a plan concerning occupational education -both of which fall far short of the original order. (10) Though respondents were ordered to submit a plan for disseminating information concerning available services by February, 1974, such task has yet to be completed. (11) Within 30 days after diagnosis respondents shall place the students diagnosed as having a handicapping condition in suitable programs. (12) Respondents shall submit a plan by January 2, 1978, establishing a proposed course of action to eliminate delays and waiting lists in the diagnosis and placement of children with handicapping conditions, including specific procedures for handling fluctuations in referrals, and a comprehensive plan to meet the needs of such children at the secondary level. (13) Respondents must submit by January 2, 1978, a report of the means used for disseminating information concerning available services to all interested persons and to notify parents of handicapped children of such services.

In the Matter of Reid, No. 9526, New York Commissioner
of Education, Order, 10/12/77 (Clearinghouse #

Appeals in long-standing matter involving the provision of special education programs and services for handicapped children in New York City Public Schools. The school district had failed to comply with a 1973 order requiring the placement of unserved children in need of special education and allowing parents to exercise an option to arrange appropriate private placements for children who had been on waiting list. Here, show cause hearing was conducted regarding whether the district should be allowed 30 school days to effect certain placements ordered. Rulings: (1) Members of the Organization to Assure Services to Exceptional Students have not demonstrated sufficient standing to become petoners in appeal to Commissioner but may be involved as amicus curiae. (pp. 2-3) (2) "The obligation of a board of education to promptly determine the needs of a handicapped child and promptly provide a suitable program is contained in [state regulations] §200.5(e)." (pp. 3-4) (3) "Where a school district has knowledge of a child's handicap and then fails to provide a proper educational program it may be liable for the cost of a private placement arranged by the parent." (p. 4) (4) For any student determined to be handicapped after September 2, 1977, the district will have 30 days to arrange placement in a suitable program. And, "if respondents achieve their goal of establishing sufficient public programs and improving the time in which students are evaluated and placed, there will be no need for my order allowing a parent to arrange a private placement." (p. 5) (5) "[F]or the present...", the district may not transfer a child to a public program from a private program unless the current program is inappropriate. (p. 6)

Swain v. State Board of Education, Appeal No. 7405 Sup.Ct.,
N.H., 5/29/76

Appeal from decision of the state board of education not to order the original assignment of plaintiff's child to a publicly supported preschool special education program. Because the child had not reached school age, the school board denied the request. The state board ruled that it was unable to make such an assignment. Rulings (in dismissing appeal): (1) Under Chapter 186-A (Supp. 1975), "although [special] education is authorized, assignment of preschool children is made at the discretion of the local school districts." (2) Under R.S.A. 193:3 (Supp. 1975), the state board of education can only make a reassignment of a child previously placed and cannot make an original assignment. Moreover, the state board's authority is limited to grades K-12 and does not reach preschool special education programs.

Zick v. Ambach, C.A. No. 78-C-986,
E.D.N.Y., 5/78 (Clearinghouse #24,810A)

Plaintiffs challenge the failure of the New York State Commissioner of Education to review within 30 days decisions of local educational agencies concerning the identification, evaluation, and placement of handicapped children and the Commissioner's failure to promulgate a regulation establishing the 30 day requirement. Plaintiffs allege violations of P.L. 94-142, The Education for All Handicapped Children Act, 20 U.S.C. §1415, and of regulations implemented under P.L. 94-142, specifically 45 C.F.R. §121a.512(b), which requires that a state complete its review within 30 days after receipt of a request for review. Plaintiffs seek declaratory and injunctive relief ordering rule-making and review within the 30 day time period and compensatory and punitive damages. By stipulation, parties agree: (1) to a timetable to be followed by the Commissioner in clearing up a backlog of cases for review by September 30, 1978; (2) that Commissioner will comply with the 30 day requirement; (3) that periodic monitoring reports will be submitted to plaintiffs' counsel; and (4) that motion for class certification is adjourned sine die.

See Mattie T. §140B; Allen §140C.2; Capello §140C.2; Lopez §140C.2; P-1 §140C.2; Guempel §140D; Henkin §140D; Eberle §140E; Stemple §140E.

140B. Identification and Evaluation

Akers v. Bergner, Civil Action No. 80-112 (D.Kan. 2/14/80)

Class action brought on behalf of all school-aged persons with epilepsy in Kansas who have allegedly been denied their right to a free appropriate public school education due to defendant Board of Education's refusal to screen, identify, and evaluate school age children with epilepsy. Defendants allege that epilepsy is not a handicapping condition which makes children eligible for special education programs. The named plaintiff's epilepsy has caused behavioral problems which are detrimental to his education. An independent evaluation by the University of Minnesota recommends the named plaintiff receive a program of specialized services. Defendants however refuse to provide such services. Plaintiff therefore brings this action pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Equal Protection and due process clauses of the Fourteenth Amendment and K.S.A. 72-933 seeking to enjoin defendants from failing to provide plaintiff with a special education program designed to meet his special needs and failing to identify, evaluate and provide appropriate programs to all plaintiffs who are in need of special education due to their epilepsy.

Beauchamp v. Jones, 413 F.Supp. 646 (D.Del., 1976)
(3 Judge Ct.)

Action on behalf of handicapped children alleging that members of the Delaware Board of Education and the state superintendent have deprived plaintiffs of Fourteenth Amendment rights by implementing statutes and practices discriminating against exceptional children. Plaintiffs seek declaratory and injunctive relief preventing defendants from enforcing statutes which deny plaintiffs a free and adequate education and ordering defendants to provide free public education to plaintiffs. Defendants move to dismiss for failure to state a claim and for lack of jurisdiction. Rulings (in denying motions): (1) "[A] person who is alleged to have acted under color of state law to deprive another of a federally secured right may be sued for injunctive relief even though the relief requested will require him to exercise authority which he has solely by virtue of his official position and even though that relief may entail future expenditure of public funds...." (648; citations omitted) (2) The individual defendants are "persons" under 42 U.S.C. 1983, and the court has jursidiction under 28 U.S.C. 1343(3).

Central York School District v. Commonwealth Department of Education, Pa.Cmwlth, 399 A.2d 167 (1979).

Action by the Central York School District alleging that its duty to provide a special education program for gifted students was contingent upon the Commonwealth's obligation to reimburse the School District for the cost of the program and that since the school district had reason to believe the Department of Education would not provide reimbursement, there was no obligation to provide a program for the gifted. Holly (the gifted child in question) had been recommended for a program for the gifted following a due process hearing. The Secretary of Education affirmed this placement. The School district alleges that since the assistant special education director of the local intermediate unit had notified it that programs for the gifted would not be funded under the district's Special Education Budgets, such statement meant that there would be no reimbursement for such programs. Rulings (for the plaintiff): (1) Gifted and talented children are included in 24 P.S. §13-137's definition of exceptional children in need of special education (see 22 Pa.Code §3.1). (p. 168) (2) While 23 P.S. §13-1373 requires the Commonwealth to reimburse school districts for costs of special education, "this provision does not make state reimbursement a condition precedent to the duty of school districts to provide special education for exceptional students required by Section 1372. To the contrary, we believe that the School District's duty set forth in Section 1372 to establish an educational program for the gifted is mandatory and a condition to its right to receive reimbursement from the Commonwealth." (p.169) (3) Pursuant to Justice Cohen's holding in Rose Tree Media School District v. Department of Public Instruction, 431 Pa.233 (1968), once the State Department of Education has approved the amount of reimbursable costs, there is no discretion left to the Department in arriving at the actual amount which must be paid to the school district. Therefore Central York School District is not without a remedy to obtain reimbursement for an approved program of special education for gifted children. (p.169).

Note: The inclusion of gifted students within the category of "exceptional students in need of special education" is a matter of state law; federal special education statutes do not include the gifted within their coverage.

Division of Special Education, Mass. Dept. Education v. Superintendent of Schools and School Committee of Holyoke, Docket #79D-001, Bureau of Special Education Appeals, Decision and Order, 6/22/79

Petitioner, Division of Special Education of the Mass. Department of Education, alleged that within certain special education programs in the Holyoke Public Schools there existed a pattern of assignment for Black and Hispanic students which was substantially disproportionate to the distribution of white students. Enrollment data evidenced that Black students were overenrolled in special education in general, and specifically in the most restrictive public school placement; that Black students were substantially under-enrolled in the less restrictive public school placements and in private special education schools; that Hispanic students were substantially under-enrolled in special education in general, and specifically in the least restrictive program, while being substantially over-enrolled in the more restrictive prototypes. A hearing was held pursuant to the Massachusetts Special Education Act, G.L. c.71B, §6, §§1M and 1N, and c.30A, the State Administrative Procedures Act, to investigate the petitioner's allegations of a prima facie denial of equal educational opportunities in special education programs in Holyoke, and to provide respondent an opportunity to show that such "disproportion is necessary to promote a compelling educational interest of the children affected and of the Commonwealth." G.L. c.71B, §6. The hearing officer ruled that because of the complex nature of the matters at issue, the hearing would be bifurcated: the first phase, the subject of this decision, to consider Holyoke's liability under G.L. c.71B; and the second phase, to consider the remedy(ies) if liability were found. A petition to intervene by two individuals in their capacities as family counselors, on behalf of Black and Hispanic children in need of special education in the Holyoke Public Schools, was allowed over respondent's objections. Rulings (in finding that the Division has presented a prima facie case under G.L. c.71B, §6 that Holyoke has denied Black and Hispanic students equal educational opportunity): (1) The statute premises a prima facie denial upon a finding by the Dept. of Education that a pattern of assignment of minority students that is "substantially disproportionate" exists in any special education program in the school district. (pp. 16-17) (2) Although the term "substantially disproportionate" is not defined in either the state special education statute or its regulations, where the legislature has failed to provide a definition of a statutory word or phrase, broad and reasonable discretion in defining such word or phrase is accorded the administrative agency responsible for enforcing the statute. (p. 17) (3) The Division has reasonably construed the phrase "substantial disproportion" of minority enrollments in special education to mean plus or minus 20% of the white student special education enrollment rate. Despite gaps in the explication of its methodology, the Division has carefully and consistently applied its standard, which was within its statutory discretion. (pp. 18-19) (4) The Division's analysis of enrollment patterns based upon the distribution of white students in special education in the school district focused attention on whether the district's practices result in differential treatment of minorities, an issue fundamental to c.71B, §6 and to any analysis of possible denial of equal educational opportunities. (p. 19) (5) Respondent's argument that a "pattern of assignment" does not exist even though there is a substantial disproportion in 4 of the 10 program categories, is unpersuasive. ". . .I accept the Division's construction of the statute requiring substantial disproportion in overall prevalance in special education and in one or more program prototypes." (pp. 20-21) (6) The Division's standard of plus or minus 20% as applied in this case is reasonable, as is its standard for a "pattern of assignment," and such standards are within the Division's discretion to set under G.L. c.71B, §6. (p. 22) Rulings (in finding that respondent has failed to make a showing of compelling educational interest to justify the existent statistical disproportion): (1) The failure of Holyoke school officials to inquire about possible reasons for the disproportionate special education statistics is inconsistent with an educational philosophy of assuring that each child receives the services necessary to meet his/her individual needs. The intent of G.L. c.71B, §6, and purpose of the prima facie case based on the school district's own statistics, is to compel an inquiry beyond statistics and generalities to determine whether the children at issue are being denied equal educational opportunities due to race or national origin. (p. 24) (2) Holyoke's referral, evaluation, and plan development processes are not carried out in accordance with the spirit and letter of the Chapter 766 Regulations promulgated under G.L. c.71B; nor are placement decisions made without knowledge of the students' race or national origin. (p. 25) (3) The inadequacy of the school district's forms, is reflected by their failure to disclose some basic parental rights, to explain simply and adequately the evaluation and placement processes, to contain current information. (pp. 25-26) (4) Evidence indicates that in significant areas Holyoke's procedures do not comport with the special education regulations, i.e., long delays between referrals for evaluation and the evaluation itself; failure to ensure that parents of special needs children understand the processes and their rights; failure to provide special education services to children determined to have special needs; and failure to follow procedural requirements under G.L. c.71B and its regulations. (5) Based on the evidence, Holyoke has not demonstrated a compelling educational necessity for the statistical disproportion. Rather, the evidence shows that the denial of equal educational opportunities for Black and Hispanic students in Holyoke has a direct and deleterious effect on the provision of special education services to individual minority students. (pp. 27-28) Rulings (in requiring Holyoke to submit a plan to eliminate a denial of equal educational opportunities): (1) Where the Division has made a prima facie case under G.L. c.71B, §6, that respondent has denied Black and Hispanic students equal educational opportunity, and Holyoke has failed to meet its burden to demonstrate a compelling educational interest for the statistical disproportion, a denial of equal educational opportunities is found to exist in Holyoke. Pursuant to G.L. c.71B, §6 such a finding requires respondent school officials to submit a remedial plan to eliminate such denial, effective for the 1979-1980 school year.

Pursuant to the hearing officer's responsibility under G.L. c.71B, §6, a detailed order was issued with respect to the provisions of the remedial plan, which ultimately took the form of the consent decree described below.

> Division of Special Education of Mass. Department of Education v. Superintendent of Schools and School Committee of Holyoke, Mass. , Docket #79D-001, Comm. Mass., Dept. of Educ., Consent Decree, 2/5/80.

Following a decision by the presiding officer from the Bureau of Special Education Appeals of the Massachusetts Department of Education upholding allegations that Black and Hispanic students have been denied equal educational opportunities in the Holyoke Public School System concerning their participation in special education programs and services, a consent decree constituting a final order pursuant to G.L. c.30A, Section 14 and G.L. c.71B, Section 6 was agreed to by the parties. Pursuant to the consent decree (1) respondents agree to withdraw with prejudice their appeal of the Decision and Order of June 22, 1979, and any other action that may be pending as to these issues and agree not to institute any other proceeding related to said Decision and Order. (p. 3) (2) The presiding officer retains jurisdiction of this action for five years for all purposes, including entry of additional orders, as is deemed just, necessary or proper, and any modifications to his decree which may become desirable. Each party will be afforded the opportunity to be heard. (p. 3) (3) The parties agree to implement a remedial plan to secure the rights of minority students to equal opportunities with respect to their participation in special education programs in the Holyoke Public Schools. (p. 3) Required remedial actions, which are delineated as goals, objectives, and specific tasks, include: Goal 1. Appropriately identifying and referring minority students to special education. (p. 3) Such goal is to be accomplished by providing mandatory inservice training to school principals, regular, Transitional Bilingual Education and special education staff; maintaining accurate and current pre-referral records; ensuring that all students referred for special education have the opportunity to have had modifications made within the regular school program unless referred for an emergency evaluation; and increasing the Black and other language speaking special education staff. (pp. 3-5) Goal 2. Identifying the primary home language of all students in the school system and assessing language dominance proficiency as well as achievement levels. (p. 6) Goal 3. Appropriate testing and assessing minority students evaluated for special education placement. (p. 6) The objectives to be met include: using non-discriminatory assessment techniques in the evaluation of minorities; evaluating Black and limited English proficiency students, who are referred, within the time frames of G.L. c.71B and implementing regulations; providing bilingual special education assessment for limited English proficiency students with special needs. (pp. 6-8) Goal 4. Providing individualized special education programs for minority children in need of special education. (p. 8) The primary objective to be met is to determine the appropriate placement of Black and Hispanic students currently enrolled in the most restrictive public school placements. (pp. 8-9) Goal 5. Increasing educational program alternatives within regular and special education in the public school system. (p. 9) Such goal is to be met by requiring adherence to the least restrictive requirement provision of the state special education regulations and by tabulating and analyzing quarterly the student placements and developing appropriate programs and staffings to increase program options. (p. 9)

Goal 6. Providing appropriate staffing for serving the needs of minority children in special education as soon as possible by hiring Spanish-speaking psychologists, school adjustment counselors, special needs teachers. (pp. 9-10) Goal 7. Providing for community interaction with the Special Education Program (p. 10), through the development of meaningful forms and guides for parents in their dominant language; the identification of some minority parents for peer informational sharing; and by establishing an interdisciplinary parent and community group to review special education operations. (pp. 10-11). Goal 8. Monitoring the implementation of the remedial plan and evaluating the effectiveness of the special education program for minority students. (p. 11) The objectives to be met include maintaining data on the placement status of minority students referred and/or placed in special education; disseminating information on placements and evaluations to appropriate personnel; assigning a field supervisor to monitor the identification, placement, and I.E.P. implementation for minority students. (pp. 11-12).

Frederick L. v. Thomas, C.A. No. 74-52, E.D.Pa., Memorandum and Order, 8/2/76; for earlier opinion see 408 F.Supp. 832 (E.D.Pa., 1976)

Class action on behalf of learning disabled students alleging that the Philadelphia School District does not have a program for learning disabled pupils which satisfies the Pennsylvania special education law, and also presenting federal constitutional claims. "Learning disabled pupils...[have] a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written...." According to the court's findings of fact, approximately 7890 of the 263,000 students in the school district may be learning disabled, the district provides adequate and appropriate education for mentally retarded children, learning disabled students can usually become more literate when provided special education, and the cost of education of learning disabled students is equivalent to the cost of educating other exceptional children. "Of the estimated 8000 learning disabled students in the District, approximately 1,300 have been identified." Rulings (in favor of plaintiffs): (1) Plaintiffs are entitled to relief on their pendent state law claim. (Mem. Op., pp. 20-21) (2) "Abstention is not appropriate...because the plaintiffs have proved a set of facts establishing liability without relying on unclear parts of the state statutory scheme" and because "defendants raised this issue at a late stage in this litigation...." (p. 21; footnote omitted) (3) Plaintiffs are exceptional children pursuant to Pennsylvania law and are entitled to proper educational training. (p. 21) "Plaintiffs are not being provided appropriate educational services." (p. 22) (4) Defendants' programming for LD's departs from the statutory scheme because (a) all LD's have not been identified, (b) actual programming does not conform to a state-approved plan, and (c) no report has been made which assesses current services and shows compliance with legal mandates. (p. 24) (5) "[D]efendants' deviation from legally mandated policy-making procedures makes their policy suspect." (p. 33) (6) "[T]he evidence in the record does not show that general education programs can be relied on to provide appropriate instruction for the large numbers of LD's in the District." (p. 36) While some LD's might "benefit" from general programs, such programs are not providing what is termed "appropriate education" under Pennsylvania law. (p. 37) (7) "[T]here is not a fair and subatantial relationship between present District services (the existing means for providing appropriate education) and a respectable body of relevant expert opinion." (p. 38)

Note: The remedial order is the next item summarized.

Frederick L. v. Thomas, 419 F.Supp. 960 (E.D.Pa.,1976)
Remedial Order No. 1, 8/13/76 (Clearinghouse #s 16,905A-I)

Remedial order in case in which court sustained plaintiffs' pendent claim that the Philadelphia school system's program for learning disabled students (LD's) was not in compliance with Pennsylvania law. Provisions of Order: (1) The court will appoint, on joint recommendation, a master to oversee implementation and monitoring of the order until December, 1978. (2) The master will receive bi-monthly reports from the system, report to the court, receive and approve system plans on identification and placement of LD students and refer unresolved disputes to the court which will retain jurisdiction. (3) The plan shall provide for appropriate placement of all LD students by the start of the 1978-79 year.

Frederick L. v. Thomas, 557 F.2d 373 (C.A. 3, 1977), affirming, 419 F.Supp. 960 (E.D.Pa., 1976)

Appeal from order requiring the Philadelphia school district to submit a plan for identifying all learning disabled students for the purpose of providing them a minimally "appropriate" or "proper" education. Rulings (in affirming): (1) The trial court's remedial order requiring the district to create a plan is an injunctive order which is appealable. (379) Delaying appellate review will not clarify the issues, there is no difference of opinion on the degree of injury, and postponing review would subject the district to serious harm. (379-80) (2) Abstention is not appropriate and there was no abuse of discretion by the district court. The constitutional issue is not strictly "premised" upon a question of state law since the alleged constitutional defects in the school district's programs would theoretically exist regardless of the interpretation of state statutes or regulations. State claims are, however, pendent, but state law is not so unclear as to require abstention. Abstention is not appropriate since the motion for abstention was filed at a very late date and since considerable delay would result if abstention were ordered. (381-84) (3) The identification order does not go beyond the Pennsylvania statutory mandate (Pa. Stat. Ann., Tit. 20, §§13-1371 et seq.), which indicates that only "exceptional" children are entitled to special education services. While some learning disabled children do not meet the definition of "exceptionality" and do not require special services, other children do. The only way to determine which learning disabled children are "exceptional" and therefore entitled under state law to special services is to conduct identification procedures. The district court did not misconstrue the mandate of Pennsylvania law in holding that the state statutes require evaluation of all learning disabled pupils to assure that all students who need special services receive "appropriate" training as required by state statute. (384-85)

Hernandez v. Porter, C.A. No. 75-71532, E.D.Mich., S.D., 3/14/76

Action on behalf of Spanish-speaking students who allege that they were misplaced in special education classes and that, as a result, they are entitled to remedial educational services, declaratory relief, and damages. Rulings (in dismissing in part): (1) Plaintiffs' allegations concerning the unconstitutionality of state regulations which purportedly resulted in a failure to provide equal educational opportunity are dismissed. (p. 2) (2) Claims for reimbursement on behalf of an organization which provided tutoring services to the children are dismissed. (p. 2) (3) Jurisdiction for the rest of plaintiffs' claims, which are civil rights claims, can be based on 28 U.S.C. §1343 and there is no need to consider plaintiffs' alternate claim of jurisdiction under 28 U.S.C. §1331. (p. 3) (4) When plaintiffs allege that defendants were "directly responsible" for evaluating and placing them, this is a sufficient allegation that defendants' actions were within the scope of their official duties and therefore taken "under color of" state law. (p. 3) (5) A motion to dismiss based on Wood v. Strickland, 420 U.S. 308 (1975), fails when plaintiffs have alleged that defendants knew or should have known that their actions would violate plaintiffs' constitutional rights. (p. 4) (6) Plaintiffs' complaint adequately alleges discriminatory treatment against Spanish-speaking children under 42 U.S.C. §2000d and the doctrine of Lau v. Nichols, 414 U.S. 563 (1974), which states no limitation on the number of children who must be involved. (p. 5)

Hernandez v. Porter, C.A. No. 571532, Settlement Agreement, 10/3/77 (Clearinghouse #16,272M)

Action in which Hispanic students in the Detroit school system alleged that they had been improperly placed in special education classes and been denied compensatory programs during transition periods between special education and regular education programs. The provisions of the settlement agreement include the following: (1) reevaluation of "applicable" Latino students who have been placed in certain special education classes, with evaluations of bilingual students to be conducted in both Spanish and English if requested, and a Latino psychologist to participate in at least 35 percent of the reevaluations; (2) provision of "bridge" or remedial services for students returned to regular classes, including in some instances a program of an older Latino youth tutoring a younger student; (3) corrective notices in student records; and (4) plaintiffs will voluntarily dismiss the action on December 15, 1978, unless the agreement "has not been substantially complied with."

Hernandez v. Porter, C.A. No. 5-71532, E.D. Mich., Motion for Enforcement and Modification of Settlement Agreement, Memorandum of Law and Plaintiff's Response, 9/7/78, 8/15/78

Action challenging misplacement of Latino pupils in special education classes in the Detroit School system. In October, 1977, the parties entered a settlement agreement providing, in part, for reevaluations, remedial services including a youth-tutoring-youth program, and correction of student records. Plaintiffs, after substantial investigation, allege that defendants have generally failed to implement the agreement. Plaintiffs seek a finding of contempt, appointment of a monitor to assure compliance, any modifications necessary to assure compliance, and an award of the costs incurred in investigating compliance and attorney fees.

Isgur v. School Committee of Newton (Appeals Court of Massachusetts, Suffolk County, 2/28/80) 3 EHLR 552:197

Action by parents of learning disabled child seeking reimbursement for tuition costs of their son's private schooling which they claim was necessitated by the failure of the school committee of Newton to provide an adequate special education plan for him under Massachusetts Special Education Law (Chapter 766) and the applicable regulations of the Department of Education. Plaintiffs allege that failure to provide a full "core" evaluation of their child violated their rights under Chapter 766. When the child's parents requested a full core evaluation of their child pursuant to Reg. 319.1(b) the school district gave John an intermediate core evaluation instead. The latter evaluation requires

the participation of fewer experts and a lesser number of assessments. The plan recommended by the evaluation team placed John in a regular classroom with supplementary reading and mathematics services. Plaintiffs rejected this plan and appealed through to the State Commissioner for Special Education. The parents also sought review in the superior court, which affirmed the decision of the Commissioner,who held that the school system offered a program adequate to meet the needs of plaintiff's child. During this time plaintiffs had placed their child in private placement. Plaintiffs allege that failure of the school disrtict to perform a full core evaluation of John requires the invalidation of the decisions made by the hearing officer and state commission. Rulings (in affirming): (1) "[A] failure to comply with the regulation requiring a full core evaluation upon the parents' request goes to the essence of rights protected by c.766." (p. 552:200) (2) However, "plaintiffs are entitled to relief under G.L. c.30A §14(7), only if their substantial rights have been prejudiced by the decision of the bureau as incorporated into and affirmed by the decision of the Commissioner." (p.552:200)
(3) A review of the evidence submitted to the hearing officer indicates that her decision that the school district could provide an appropriate program for plaintiff's son and that private placement was unnecessary is correct. (pp.552:200-201) (4) "Of course, it is possible that he [John] might have made greater progress in the presumably smaller classes at the private school, just as we assume that many nonspecial needs children would have made greater progress in smaller classes if there were resources to provide them, but this is not the test for determining prejudice to John and his parents." (p.552:201). (5) "The plaintiffs did not sustain their burden of establishing that the Newton program as modified could not benefit John to the "maximum extent feasible" while retaining him in the least restrictive alternative to a regular education program." (pp.552:201). (6) Plaintiffs may have showed a need for private placement by presenting the evaluation of the other assessments made of John by an independent evaluator, or by requesting a further hearing debate after the private school had written an educational plan for him, or by demonstrating through other witnesses that John required a class size and structure which was not possible in a public school setting. "Absent this type of clear and unequivocal evidence. . .we find not only no abuse of discretion or arbitrary conduct on the part of the hearing officer but also that no substantial right of the plaintiff has been prejudiced." (p.552:201)

(7) In light of "the committee's good faith efforts to provide John the education to which he is entitled, and the demonstrably compelling conclusion "from the record that the team for a full core evaluation would have proposed a plan much like that accepted by the hearing officer, we find no reversible error. The parents are not entitled to reimbursement for private school tuition." (p.552:201).

Jose P. v. Ambach, Civil Action #79 C 270 (E.D.N.Y. 12/14/79)
3 EHLR 551:412 (Clearinghouse #25,934)

Action on behalf of all handicapped children living in New York City between the ages of 5 and 21 who have not been promptly evaluated and placed in appropriate educational programs after the local educational agency was notified of their need for evaluation. Action brought under P.L. 94-142 (20 U.S.C. §§1401 et seq.), §504 of the Rehabilitation Act (29 U.S.C. §794), and New York state law. This decision on the merits follows earlier action which granted class certification and allowed the participation of amici and appointed a special master. Rulings (in granting declaratory and injunctive relief): (1) Defendants' failure to provide plaintiff class with a free appropriate public education in the least restrictive environment violates the requirements of P.L. 94-142, Section 504 of the Rehabilitation Act of 1973, and the New York Education Law §§4401 et seq. (p. 551:414) (2) Defendants are to provide an educational evaluation within 30 days after it is requested and to provide an appropriate educational program and related services within 30 days of evaluation or within 60 days of notification that a child may be in need of such services. (p. 551:414) (3) Delays due to parental non-cooperation shall not be counted towards these time limitations if defendants have notified and attempted to involve parents. (4) In order to insure identification, defendants are ordered to complete by December 1, 1980, a district-by-district census of all handicapped children under 21 in New York City in a manner consistent with New York Education Law §§4403.1 (p. 551:415) (5) "Defendants shall maintain and adequately staff an identification outreach office for the purpose of disseminating information about defendants' programs for children with handicapping conditions and locating children potentially in need of the service of these programs." (p.551:415) (6) All census and outreach efforts shall include specific attempts to locate students of or from families with limited English-speaking ability. (p. 551:415) (7) Timelines are set for full evaluation and provision of appropriate educational services to all handicapped children. (p. 551:415-416). (8) "School-based teams" (consisting of the parents, the child (if appropriate), the principal or the principal's non-special education designee, a guidance counselor (if assigned), a psychologist, a social worker, an educational evaluator and regular or special education teachers) shall be developed for every school to serve all children in need of evaluation and placement. (p. 551:416) (9) "[D]istricts with the largest waiting lists for evaluation and placement shall be given priority in conversion to school-based operations." (p. 551:416) (10) Students with limited English proficiency should be evaluated in their native language or mode of communication. (p. 551:416). (11) All parents are to be informed of their children's rights to special education and to be invited to attend each meeting of a committee on the handicapped held to discuss a child's needs. (p. 551:417) (12) Defendants must have on the staff of each district committee on the handicapped at least one professional educator familiar with all the special education programs available in the district. (p. 551:417) (13) Timelines and quotas are set for the provision of expanded resource room facilities within the district and residential programs in the City (p. 551:417). (14) Timelines for hiring sufficient special education personnel are set forth. (p. 551:418) (15) Defendants shall assure that all facilities housing centers for the multiply-handicapped and programs for the physically handicapped and profoundly retarded shall be accessible to physically handicapped and nonambulatory students in accordance with the requirements of 45 C.F.R. §84.22 (p. 551:418) (16) Defendants will develop a plan which assures that "all students have full access within a reasonable distance from their homes to all services from which they are capable of benefitting including, but not limited to, gymnasiums, libraries, lunch rooms, auditoriums, and other mainstreaming opportunities, that proper ventilation is provided to meet the needs of incontinent students, and that proper toilet facilities are provided for wheelchair bound students." (p. 551:418) (17) Defendants shall prepare a detailed monthly report for the parties and master on the educational and placement details of their special education program. (p. 551:418) (18) Defendants shall make an assessment of the staff need in each type of position and offer pre-service and inservice training to all newly hired persons. (p. 551:419) (19) Defendants will submit detailed plans for partial implementation (the January plan) and then for full implementation (April plan) of services to be provided (pp. 551:419-422).

Note: This case may be of particular interest to special education advocates as to the obligations defendants must perform in order to assure a free appropriate public education to handicapped students.

Larry P. v. Riles, No. C-71-2270 RFP (N.D. Cal. 10/16/79),
3 EHLR 551:295

Decision on permanent injunction in landmark case involving challenge by black students of placement process for classes for the educable mentally retarded and use of standardized individual intelligence tests in California schools. A preliminary injunction was previously granted plaintiffs, see 343 F.Supp. 1306 (N.D.Cal. 1972), aff'd, 502 F.2d 963 (9th Cir. 1974). Rulings (in granting permanent injunction): (1) The history of I.Q. testing and of special education classes built on I.Q. testing is at least in the early years, a history of racial prejudice and the use of scientific "mystique" to legitimize such prejudices. (p. 8) (2) Classes for the educable mentally retarded were designed and operated only to teach minimal skills and were not used to return students to the regular curricular program; students once placed in an EMR class are, therefore, segregated and trapped there (pp. 18-19) (3) Black children are substantially overrepresented in EMR classes; statewide, black children constitute approximately 10% of the total student population but 22.6% of the enrollment in EMR classes. (pp. 1920) (4) Overenrollments of black students are not the result of chance and are not explained even by a slightly higher incidence of mild retardation among black children. (p.48) (6) There is a private cause of action to enforce rights granted by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (citing Cannon v. University of Chicago, 60 L.Ed.2d 560 (1979), recognizing a private cause of action in Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex). (pp. 52-54) (7) There is a private cause of action under P.L. 94-142, 20 U.S.C. §1415(e)(2), although an exhaustion of administrative remedies normally is required before judicial action. (pp. 54-55) (8) Exhaustion is not required here since it would be meaningless, futile and superfluous; because this is essentially a constitutional, not a statutory case, exhaustion is not appropriate. (pp. 55, 57) (9) Exhaustion is not required under Title VI and Section 504 since there is a classwide benefit but no administrative mechanism for assuring individual participation in the administrative proceedings set forth in the statute (citing Cannon, supra). (p. 56) (10) It would be absurd to deny redress under P.L. 94-142 on the theory that exhaustion was required under that statute when that claim is so clearly tied to the Title VI and Section 504 claims, which require no exhaustion. (p. 56) (11) Title VI prohibits actions which have a discriminatory effect (citing Lau v. Nichols, 414 U.S. 563 (1974).(p. 58) (12) Lau does not dictate affirmative remedial education in all situations but, at a minimum, prohibits the penalty imposed on blacks by overwhelmingly disproportionate placement of blacks in dead-end EMR classes. (p. 59) (13) Plaintiffs' prima facie case establishing discriminatory effects could have been overcome if defendants had shown that the test and placement results were caused by a greater incidence of mild mental retardation in the black population or had shown that the tests had been validated for the purpose of EMR placement for black children, but neither showing was made by defendants. (p. 61) (14) Section 504 prohibits discrimination against the handicapped and against those regarded as being handicapped and particularly seeks to protect students from erroneously being denied admission to regular classes; P.L. 94-142 has similar protections and, in addition, provides procedural protections, including protections against the use of racially or culturally discriminatory evaluation techniques. (pp. 62-63). (15) Both Section 504 and P.L. 94-142 require that evaluation materials be validated for the specific purpose for which they are used, i.e., there must be showing that the evaluation tools are suited for the purpose for which they are used. (p. 64) (16) The allocation of burden of proof used to assess validation in cases alleging discrimination in employment testing (i.e., once plaintiffs show that the tests used have a discriminatory impact, the employer must show that the test requirement has a manifest relationship to the employment in question, then, the plaintiffs must show that alternative non-discriminatory selection devices exist that would serve the employer's legitimate interests) provides an appropriate method for analysis here. (p. 65) (17) While the employment testing notion of validation on the basis of predicting successful job performance cannot be translated to the educational context, it is appropriate to determine whether the tests have been validated for the purpose of placing black students into classes for the educable mentally retarded. Defendants therefore have the burden of showing that intelligence tests are valid indicators showing that students who perform poorly on the tests have no possibility of performing successfully in regular classes even with remedial instruction. (pp. 66-67) (18) Validation of intelligence tests has been assumed, but never established, for blacks; (pp. 67-68) and defendants have not met their burden of showing that intelligence tests are valid means of diagnosing the kind of mental retardation justifying EMR placement. (p. 69) (19) Evidence concerning placement decision-making since the court's preliminary injunction and defendants' voluntary moratorium on the use of intelligence tests shows that there are alternatives to use of the tests and that these alternatives are less discriminatory. (p. 73) (20) However, while less discriminatory alternatives are being used, they have not been validated and are still producing intolerable disproportions. (p. 74) (21) While plaintiffs can prevail on the basis of their federal statutory claims alone, plaintiffs also prevail on an equal protection theory. (pp. 75 and 94) (22) Plaintiffs here would prevail under an analysis based upon a presumption of intent to discriminate arising from disproportionate effects, shifting the burden to defendants to show less segregative procedures were unavailable (citing Lora v. Board of Education, 456 F.Supp. 1211 (E.D.N.Y. 1978)). (p. 81) (23) Foreseeability of the consequences of official action can provide a strong inference that disproportionate effects were desired, but some finding of subjective intent is needed. (p. 82) (24) Discriminatory intent does not necessarily mean intent to harm,but only intent to segregate, minority children in separate schools or special all day classes. Intent can be ascertained by reviewing the impact of the official actions, the historical background of the decisions, the specific events leading up to the challenged decisions, departures from normal procedural sequence, substantive departures that suggest the outcome might have been different, and direct statements by defendants. (p. 85) (25) In this case,the tests used obviously had racially discriminatory effects (p. 85); the history of test formulation and use is racially tainted and racially neutral tests or criteria have not been developed (p. 86); the process of adopting the test requirement in 1969 was riddled with procedural and substantive irregularities (p. 87); defendants knew of but overlooked the probable discriminatory impact and questions concerning the use of intelligence tests (p. 87) (26) The general reputation and universal acceptance of intelligence tests cannot negate the inference of discriminatory intent, especially given the failure to validate the tests for black students. (p. 88) (27) Acts and omissions by state department of education employees concerning test use confirm the existence of discriminatory intent as when, for example, those employees ignored a legislative mandate expressing concern over disproportionate minority EMR placements, assuming that the disproportion resulted from higher rates of retardation among minorities. (p. 90) (28) Evidence that nothing was done to insure that local districts followed through with the testing moratorium or to provide procedural protections imposed by the legislature is further evidence of discriminatory intent. (p. 91) (29) Since plaintiffs have established discriminatory intent and there is no evidence that the state would have acted the same but for the discriminatory purpose, "strict scrutiny" applies. (p. 94) (30) Under a strict scrutiny analysis here, defendants can show no compelling state interest in the use of the I.Q. tests or the maintenance of EMR classes with disproportionate minority enrollments. (pp. 94-95) (31) Under an intermediate standard of equal protection analysis, lying between strict scrutiny and a rational basis analysis, plaintiffs would also prevail since there is no showing that the tests and disproportionate enrollment substantially furthered the purpose of providing the best educational opportunities for students. (pp. 95-97). (32) Plaintiffs have also established a violation of California's state constitutional guarantees of equal protection. (p. 97).

Note: This case is on appeal to the Ninth Circuit.

Levy v. Commonwealth, Dept. of Education, 399 A.2d 159 (Pa.Cmwlth.Ct.,1979).

Action by 16 year old brain-injured child seeking to reverse the Department of Education decision to disapprove the recommended placement of the child (Sharri) in the Vanguard School, a school for brain-injured children. Sharri had been at another private school for brain-injured children for seven years when her parents requested an alternative placement since Sharri was approaching secondary school age and the school she was attending was moving to another location some distance from its former location. The school district then determined Sharri to be brain-injured and recommended her placement at Vanguard. This placement was not approved, however, on the grounds that the Secretary of Education determined Sharri to be mentally retarded and not brain damaged on the basis of her score on an I.Q. test and therefore not a proper candidate for Vanguard. Petitioner seeks review of this decision. Rulings (in reversing): (1) "In reviewing the secretary's adjudication, we are required to affirm the decision unless a violation of constitutional rights has occurred, an error of law has been committed, or the findings of fact are not supported by substantial evidence." (p.161) (2) The Department's major if not sole reliance on the results of I.Q. tests for purposes of classifying Sharri as mentally retarded did not constitute substantial evidence upon which to base a finding of mental retardation. "While it is true that I.Q. scores evidence a certain level of intellectual capability, certainly they should not be relied upon - to the exclusion of other medically recognized and accepted factors - to classify a person as mentally retarded." (p.162) (3) None of the witnesses for the Department were able to make an unequivocal statement that Sharri's disability is definitely a result of mental retardation, while experts who testified on Sharri's behalf agreed that her handicap was not attributable to mental retardation. Thus, there appears to have been blatant disregard of competent evidence establishing that she is not mentally retarded but rather brain injured. (p.162) (4) The Department's argument that Sharri should be placed in public school is rejected. Though Pennsylvania law (see 22 Pa.Code. §§13.9, 13.11(d), 171.13, and 171.16(c) establishes a priority order of placement with placement in a regular school with supporting services as the first priority, it is clear from Sharri's past experience in the public schools that such placement will result in her withdrawal, isolation, and regression. (p.163).

Mattie T. v. Holladay, C.A. No. DC-75-31-S, N.D.Miss., Motion for Summary Judgment, 12/13/76

Class action by children residing in six school districts challenging provision of special education services throughout Mississippi. Plaintiffs allege that practices violate the Education for the Handicapped Act - Part B, 20 U.S.C. §1411 et seq. and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794. Plaintiffs' motion for summary judgment contends that defendant officials have failed to enforce provisions of the EHA requiring due process safeguards for evaluation and placement decisions, location and identification of all handicapped children needing special education services, non-discriminatory classification and placement procedures, and maximizing of contact between handicapped and non-handicapped pupils. Plaintiffs seek in part an order requiring the development of a comprehensive remedial plan.

Mattie T. v. Holladay C.A. No. DC-75-31-S, N.D.Miss., 7/28/77 (Clearinghouse #15,299H)

Class action by handicapped children challenging the supervision of locally provided special education services by the State Department of Education. Rulings (in granting plaintiffs' motion for summary judgment): (1) Defendant state officials have violated plaintiffs' rights under the Education of the Handicapped Act (20 U.S.C. 1401 et seq.) by failing to provide procedural safeguards to challenge decisions regarding educational evaluation and placement, failing to conduct child identification programs, failing to use racially and culturally nondiscriminatory tests and procedures, and by failing to provide special education programs and services in the least restrictive environment. (pp. 1-2) (2) State defendants shall file with the court a copy of their HEW-approved Annual Program Plan for FY 1978. After plaintiffs have an opportunity to object and the defendants to respond, the court will take the matter under advisement, or schedule a hearing. (p. 3)

Mattie T. v. Holladay, C.A. No. DC-75-31-S, N.D.Miss.
(two separate but substantially identical orders), 7/28/77
(Clearinghouse #s 15,299I,J,K,L)

Class action by handicapped children who challenge the special education services provided by two local school districts. Rulings (in granting plaintiffs' motion for partial summary judgment): (1) Individual plaintiffs are otherwise qualified handicapped individuals within the meaning of §504 of the Rehabilitation Act, 29 U.S.C. §794. (p. 2) (2) Defendant local school officials have discriminated against individual plaintiffs in educational programs solely because of their respective handicaps. (p. 2) (3) Named plaintiffs shall be evaluated and provided appropriate educational services. (p. 2) (4) Defendants shall submit reports on compliance and the court shall retain jurisdiction. (p. 2)

Mattie T. v. Holladay, C.A. No. DC-75-31-S, N.D.,
Miss., Consent Decree, 2/22/79 (Clearinghouse
#15,299M)

[The following summary is based upon one prepared by counsel for the Childrens' Defense Fund, 1520 New Hampshire Avenue, N.W., Washington, D.C., 20036, which represents plaintiffs in this case.]

On February 22, 1979 United States District Judge Orma R. Smith approved a comprehensive consent decree settling the four-year-old Mississippi special education case, Mattie T. v. Holladay, Civil Action No. DC-75-31-S (N.D. Miss.). This case, on behalf of all school-aged children classified as handicapped in the state, challenges the failure of officials of the State Department of Education and seven local school districts to enforce the children's rights under Public Law 94-142, the federal Education for All Handicapped Children Act, 20 U.S.C. §§1401, et seq. p. 152) The twenty-six named plaintiffs fall into two categories: 1) handicapped children who were either excluded from school entirely, inadequately served in segregated so-called "special" programs, or ignored in regular classes; and, 2) non-handicapped minority children who had been misclassified as mentally retarded and placed in inappropriate segregated "special education" classes. The district court had ruled in July 1977 that the defendants had violated the children's federal rights and ordered submission of a comprehensive compliance plan.

This consent decree reflects agreement on the terms of this plan and builds on the Annual Program Plan Mississippi has submitted to the federal government for funds under P.L. 94-142. The major components of the consent decree are: (1) The class to which the decree applies is defined as "all children residing within the State of Mississippi who are ages six (6) through twenty, inclusive, and who are either handicapped or considered by their schools as handicapped." (p. 4) (2) Least Restrictive Environment (Mainstreaming). The decree establishes specific criteria for determining when a school district can place handicapped children in classes and buildings separate from the regular education environment. It also requires all state agencies administering institutions to develop specific plans with local school districts for placement of many institutionalized children into local district day programs and provides that placement in these non-institutional programs be part of the individualized educational plan (IEP) process. The decree also established a system of surrogate parents to represent children in foster homes or institutions who do not have parents. (pp. 9-17) (3) Non-Discriminatory Testing. The decree requires the state to hire outside experts to evaluate and revamp the entire state procedure for classifying and placing handicapped children. The experts' report, due this summer, is to be implemented by a change in state policy and a state-wide two-year teacher training program. Because black children are disproportionately placed in classes for the learning disabled, the decree establishes a specific goal for the state to cut this disparity at least in half within three years. Lastly, the decree sets a strict timetable for the individual evaluation-placement process. (pp. 17-24) (4) Compensatory Education. Each local school district must identify all children misclassified as mentally retarded and provide them an opportunity for a compensatory educational program. Children under 15 are to receive tutoring and other services to get them on track for a diploma. Older children will have a choice between this academic assistance or a combined GED/vocational education program. This compensatory program is to be provided beyond the Mississippi school age of 21 years, if necessary. (pp. 29-31) (5) Suspensions. To insure that handicapped children's problems are addressed programatically and not ignored, school districts are prohibited from removing children from school for longer than three days. Such three-day removals can occur only if the child's behavior represents an immediate physical danger to him/herself or others or constitutes a clear emergency within the school such that removal is essential. Serial three-day removals are prohibited. A three-day removal triggers a review of the child's educational program and services. (pp. 21-22) (6) Complaint Procedure. The decree establishes a state-wide mechanism for complaints of systemic problems. (pp. 27-29) (7) State Department of Education Monitoring and Enforcement. The decree strengthens the state system of monitoring local school districts' and other state agencies' compliance with federal law, including a requirement that the state interview parents of children served by the agency being monitored and specific timelines for state remedial action. The decree also requires the state to withhold federal funds from non-complying districts or agencies. (pp. 24-27, 34-40) (8) Procedural Safeguards and Child Find. The decree improves present state practices by requiring the state and school districts to distribute to parents of all handicapped children in the state an agreed-upon Parents' Rights Booklet, to compile decisions of hearing officers and make them available to the public, and to conduct out-reach to community groups (including Headstart programs) in conducting child find. (pp. 6-9)

Note: CDF writes: "This is the first comprehensive court order under P.L. 94-142 and it specifies the state's responsibilities for implementing the federal law. This suit was necessitated in part by the failure of the federal Bureau of Education for the Handicapped, the agency responsible for enforcing P.L. 94-142, to take strong action against non-complying states. It is now up to the federal agency to take the principles established in this case and enforce them throughout the country. Over 40,000 children are affected by this decree in Mississippi. There are nearly 4 million children covered by the law nationally."

North Carolina Association for Retarded Children v. North Carolina, C.A. No. 3050, Final Judgment and Order as to Plaintiffs' Right to Education (D.N.C. 7/31/78)

Action on behalf of each mentally retarded citizen of North Carolina of school age (as defined by Chapter 115 of the General Statutes of North Carolina), seeking enforcement of their federal and state right to a free appropriate public education and their constitutional right not to be excluded from a program of public education regardless of the seriousness of the handicapping condition. Rulings (in granting plaintiffs declaratory and injunctive relief): (1) Defendants shall locate all mentally retarded children in need of a free public education and shall annually conduct a public informational program through the use of media announcements, public informational meetings and mailing of notices. (pp. 3-4) (2) Defendant officials of the North Carolina Department of Public Instruction shall place each retarded child five through seventeen years of age in a program of education and training which meets the requirements of 34 C.F.R. §300.1. et seq., and 34 C.F.R. §104.1 et seq. by September 1, 1978. (p.4) (3) Any placement hearing as defined in 34 C.F.R. §300.506- 300.509 must take place at the school in which the subject child is or would be enrolled (p.4) (4) Parents may appeal any decisions of a hearing officer under Article 4, Chapter 150A of the General Statutes of North Carolina or 34 C.F.R. §300.510. (p.4) (5) The Annual Program Plan required by P.L. 94-142 shall be submitted to the parties and a Review Panel at least 120 days prior to the start of any corresponding school year in order to allow time for recommendations and objections to be made and differences to be worked out. (p.5) (6) The failure to receive approval of the Annual Program Plan shall not affect defendants' obligation under the decree. (p.5) (7) The defendants herein shall submit to all parties and to the Review Panel by January 1, 1979, and by January 1 of each year thereafter a written plan to provide adequate compensatory educational services at state expense in organized training facilities to all retarded citizens of North Carolina whose ages at the time of submission of the plan exceed seventeen. (p.6) (8) The implementation of the terms of this agreement shall be monitored by a panel of experts in the field of special education, including one panel member appointed by the State Board of Education, one member appointed by plaintiffs and plaintiff-intervenors (United States of America) and one member appointed jointly. (p.7) (9) The State shall include in every future contract with an agent or independent contractor for the education or training of a retarded child of school age the requirement that the agent or contractor perform the steps and comply with the standards or procedures that the state is required to meet in these matters. (p.2) (10) The North Carolina Association for Retarded Children shall, under a state-approved plan and at state expense, train persons to serve as citizens advocates to provide information and assistance to parents in seeking compliance with this decree. (p.8).

Parents in Action on Special Education (PASE) v. Hannon,
Civil No. 74C 3586 (N.D.Ill., E.D. 7/ /80)

Class action challenging the use of standardized tests to determine the placement of black students into classes for the educable mentally retarded. Plaintiffs contend the tests are culturally biased against black students. Classes for the educable mentally retarded are 82% black, while the total public school population in Chicago is only 62% black. The two named plaintiffs, erroneously labeled educable mentally retarded (EMR), were in fact learning disabled. Rulings (in favor of defendants): (1) To determine the question of cultural bias in the tests, an item-by-item scrutiny of the test items is essential. (p.9) (2) This case is primarily a factual controversy and most of the legal questions raised by the parties need not be reached. (p.116, n.2) (3) Many of plaintiffs' criticisms of the test have nothing to do with cultural bias; most of the items identified by plaintiffs as biased were in fact criticized as inappropriate tests of any child's intelligence, not simply a black child's intelligence. (p.97) (4) There is a substantial basis for some of plaintiffs' criticism of specific items as culturally biased (p.98), however, these few items do not render the test unfair. (p.115) (5) The I.Q. score is not the sole determinant of whether a child is placed in a class for the educable mentally retarded. (p.100) (6) While neither party contends blacks are genetically inferior, factors associated with poverty in the home often inhibit an environment which would stimulate cognitive development. (p.105) (7) The burden of proof of cultural bias in the tests rests on plaintiffs; P.L. 94-142 and its requirement that tests be free of cultural bias (20 U.S.C. §1412(a)(D)(5)) does not place the burden of proof anywhere other than on plaintiffs.(p..105-106) (8) Where I.Q. tests are only one factor which enters into an assessment of special needs and where a low I.Q. score frequently does not result in such placement, the burden of showing an absence of racial bias in the tests does not rest on defendants.(p.110) (9) The decision in Larry P. v. Riles, No. C-71-2270 (N.D.Cal. 11/11/79), contains relatively little analysis of whether test bias in fact exists and is largely devoted to the question of the legal consequences of a finding of bias; there is no bias found here. (p.114)

Note: The vast portion of this 117 page opinion consists of an enumeration setting forth each of the items (and the correct answer for each) contained in the three most commonly used I.Q. tests, the Wechsler Intelligence Scale for Children, Revised (WISC-R), the WISC, and the Stanford-Binet. Conclusions and discussion of relevant law are confined to approximately two pages.

Riley v. *Ambach*, Civil No. 79 C 2783 (E.D.N.Y. 7/1/80)

Action brought by eighteen handicapped children with their parents to challenge defendants' policies with respect to identification and education of learning disabled children. Plaintiffs seek to bring this as a class action on behalf of all those similarly situated. Plaintiffs contend that the Commissioner of Education's policy requiring that a learning disabled child "exhibit a discrepancy of 50% or more between expected achievement based on. . .intellectual ability and actual achievement" before a child qualifies as learning disabled within the meaning of the applicable federal and state statutes violates federal law in that "50%" is too restrictive a criteria to satisfy the federal standard of a "severe" discrepancy. See 45 C.F.R. §121a.541. Plaintiffs further allege that defendant has effectively denied residential placement for learning disabled children by removing all residential schools which treat L.D. children from a list of approved schools for the treatment of handicapped children and in requiring all schools in which learning disabled children account for more than 2% of the total population of school children be subject to an annual site visit; defendant has also allegedly inhibited local school districts from classifying children as learning disabled by these policies. Plaintiffs allege that these policies violate Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), P.L. 94-142 (20 U.S.C. §1401 *et seq.*) and sections 4402 and 4403 of the Education Law of New York. Plaintiffs also bring this action pursuant to 42 U.S.C. §1983 alleging that defendants have violated their 14th Amendment rights to due process and equal protection. In addition to class certification, plaintiffs seek a declaration that defendants' actions are in violation of federal law and injunctive relief requiring the Commissioner of Education to reapprove all residential schools for the learning disabled and enjoining him from employing the 50% discrepancy policy for determining the existence of a learning disability and the 2% policy for site visitations. *Rulings* (in granting in part, and denying in part, plaintiffs' motions): (1) Class certification is denied as it is "unnecessary where only injunctive and declaratory relief may be awarded. . .and the relief granted will automatically inure to the benefit of all members of the proposed class." (p. 28) (2) "There is no longer any doubt that an implied right of action exists under Section 504 of the Rehabilitation Act of 1973." (p. 29) (3) An express cause of action exists pursuant to P.L. 94-142 at 20 U.S.C. §1415(e)(2). (p. 29) (4) "The function of 42 U.S.C. §1983 is to create a private cause of action for constitutional violations." (p. 30) (5) Exhaustion is not required where "administrative procedures cannot afford adequate relief or where recourse to these procedures would be a futile exercise." Here, plaintiffs are not seeking review of their educational placement, which is the purpose of administrative hearings, but rather they are challenging general policies of the Commissioner of Education. Therefore, administrative procedures would be inadequate and futile for the relief sought and exhaustion is not required. (pp. 33-35) (6) Since the local school districts are bound by the policies of the Commissioner of Education, it would not afford plaintiffs the relief sought to remand this case for administrative hearings. Therefore, the doctrine of primary jurisdiction does not apply. (pp. 39-40) (7) Defendants' contention that plaintiffs lack standing because they allegedly have not been excluded from classification as handicapped due to having less than a 50% discrepancy nor been harmed by the denial of a residential placement is not accepted by the Court. Clearly, all the plaintiffs have "such personal stake in the outcome of the controversy as to warrant [their] invocation of federal court jurisdiction and to justify the exercise of the court's remedial powers on [their] behalf." (pp. 43-44). (8) "[T]he use of the 50% standard interferes with the proper identification of learning disabled children, as required by 20 U.S.C. §1412(2)(C), since it operates to eliminate consideration of factors and the use of techniques which do not, given the present state of the art, lend themselves to quantification." (pp. 51-2) (9) The use of only standardized test scores without consideration of unquantifiable factors results in an underidentification of learning disabled children. (pp. 52-53) (10) "The use of the 50% discrepancy test is especially inappropriate given the conceded imprecision of current testing procedures." (p. 54) (11) "Finally, the court is persuaded by the fact that, in promulgating its regulations under EHA (P.L. 94-142), HEW rejected a 50% rule, along with an accompanying mathematical formula to determine whether a discrepancy exists, because of its lack of success in devising a formula which would successfully translate the results of evaluative techniques into a 50% discrepancy cut-off." (pp. 55-56) (12) "Plaintiffs' expert witness testified, and the court finds, that a small number of learning disabled children require a residential placement and that specific learning disabilities are not necessarily of such nature or severity that education in regular classes can, without exception, be achieved satisfactorily." Therefore residential placement for learning disabled children must remain available as an option. (pp. 61, 63) (13) The Commissioner of Education's policy which assumes learning disabled children are never in need of residential placement "discriminates against one category of handicapping conditions in contravention of [federal] statutes and regulations which prohibit discrimination between different types of handicaps." (p. 64) (14) The Commissioner's policy on residential placement violates 45 C.F.R. §121a.550(b)(1): 45 C.F.R. §121a.552 in that it prevents placement decisions from being made on an individual basis. (p. 64) (15)"The availability of residential treatment is not inconsistent with the mainstreaming principle." (p. 65) (16) Defendants' policy of requiring site visits when more than two percent of the school population is learning disabled is not enjoined as "plaintiffs have not met their burden of establishing the lack of rational relationship between the site visit provision and the legitimate purpose it was designed to serve, namely insuring against incorrect evaluations and diagnoses in an area where, as plaintiffs elsewhere concede, these are exceedingly difficult to make." (p. 69) (17) The Eleventh Amendment bars an award of damages against the state for tuition reimbursement to parents who placed their children in residential schools during the school year. (p. 71).

Seaman v. Clark, Civil No. 79-0363-JWC, Memorandum
and Order (D.Hawaii, 3/17/80)

Action by a 15-year-old girl with a history of learning difficulties, seeking a judgment declaring her to be a handicapped person within the meaning of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and 34 C.F.R. Section 104.1 et seq. Plaintiff also seeks special education benefits to which she alleges she is entitled pursuant to Section 504 and P.L. 94-142. Plaintiff, who has attended school in many different areas of the country, has on various occasions been placed in several different and conflicting classifications including educable mentally retarded and specific learning disability. In Hawaii, plaintiff was initially placed in an EMR class, then a SLD placement. In January, 1979, however, the District Superintendent terminated plaintiff's SLD eligibility and recommended that she be placed in a regular education program. Plaintiff's parents appealed this decision. The hearing officer first concluded that plaintiff was handicapped and then subsequently withdrew his decision and held that the plaintiff did not meet the required standard to be entitled to special education, alleging that any discrepancies which did exist between her achievement and intellectual ability were primarily due to environmental disadvantage (in part due to plaintiff changing schools so often) and not learning disability or retardation. Plaintiff therefore brings this action pursuant to Section 504 of the Rehabilitation Act of 1973 and P.L. 94-142 seeking declaratory ruling that she is in fact handicapped. Rulings (in finding for defendants as a matter of law): (1) The hearing officer's finding that plaintiff does not fit the definition of "mentally retarded" or "specific learning disability" appears to be correct. Section 1401(15) of P.L. 94-142 specifically excludes from the category of specific learning disabilities children in the "learning problems caused by mental retardation, emotional disturbance or environmental disadvantage.'" Similarly, plaintiff is not mentally retarded since she does not have a "significantly subaverage general intellectual functioning." (pp.7-8) (2) Plaintiff's procedural rights were not violated since there was nothing improper with the hearing officer's withdrawal of his first decision; the withdrawal did not amount to a reopening of the hearing. (p.8) (3) There is no requirement that the written report required by 34 C.F.R. Section 300.543 be contained in any one document. (p.9) (4) Observation of plaintiff in the classroom as required by 34 C.F.R. §300.542(c) need not occur before the case conference meeting but rather need only be before the due process hearing in order to be timely. (p.9)

Southeastern Community College v. *Davis*, 99 S.Ct. 2361 (1979).

Respondent, who suffers from a serious hearing disability and who seeks to be trained as a registered nurse, was denied admission to petitioner's nursing program. An audiologist's report indicated that even with a hearing aid respondent cannot understand speech directed to her except through lipreading, and petitioner rejected respondent's application for admission because it believed her hearing disability made it impossible for her to participate safely in the normal clinical training program or to care safely for patients. Respondent alleges a violation of §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). The District Court entered judgment in favor of petitioner, confirming the audiologist's findings and concluding that respondent's handicap prevented her from safely performing in both her training program and her proposed profession. On this basis, the court held that respondent was not an "otherwise qualified handicapped individual" protected by §504 and that the decision to exclude her was not discriminatory within the meaning of §504. The Court of Appeals reversed, 574 F.2d 1158,holding that in light of intervening regulations of the Department of Health, Education, and Welfare (HEW), §504 required petitioner to reconsider respondent's application for admission without regard to her hearing ability, and that in determining whether respondent was "otherwise qualified," petitioner must confine its inquiry to her "academic and technical qualifications." The Court of Appeals also suggested that §504 required "affirmative conduct" by petitioner to modify its program to accommodate the disabilities of applicants. *Rulings* (in finding there was no violation of §504): (1) The terms of §504 indicate that mere possession of handicap is not a permissible ground for assuming an inability to function in a particular context, but do not mean that a person need not meet legitimate physical requirements in order to be "otherwise qualified." An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap. HEW's regulations reinforce, rather than contradict, this conclusion. (p. 2366-2367) (2) On the record it appears unlikely that respondent could benefit from any affirmative action that HEW regulations reasonably could be interpreted as requiring with regard to "modifications" of postsecondary educational programs to accommodate handicapped persons and the provision of "auxiliary aids" such as sign-language interpreters. Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. Neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds, and thus even if HEW has attempted to create such an obligation itself, it lacks the authority to do so. (pp. 2367-2370) (3) The line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will not always be clear, and situations may arise where a refusal to modify an existing program to accommodate the needs of a disabled person amounts to discrimination against the handicapped. In this case, however, petitioner's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. Uncontroverted testimony established that the purpose of petitioner's program was to train persons who could serve the nursing profession in all customary ways, and this type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person. (p. 2370).

Note: This summary is excerpted from the syllabus prepared by the U.S. Supreme Court Reporter of Decisions.

Upshur v. Love, 474 F.Supp. 332 (N.D. Calif. 1979)

Action by a blind teacher against school district officials alleging defendants' use of discriminatory policies which prevented plaintiff from obtaining a position as administrator in the school district. Plaintiff alleges that he was denied placement on a list of those eligible for administrative positions because of his blindness. He further alleges that he is qualified to be an administrator in all other respects. Defendants assert plaintiff does not have the administrative skills needed for the position, that he lacked an understanding of administrative responsibilities as well as leadership ability and experience, and that he failed to obtain a high score on a written exam. After the beginning of a Fair Employment Practices Commission investigation which failed to change the school district's position, plaintiff terminated the FEPC investigation and brought this action pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), 42 U.S.C. §1983, and the California Fair Employment Practices Act (Cal. Labor Code §1410 et seq.). Rulings (for defendants): (1) "A physical handicap is a trait far more analogous to age, which only evokes the rational basis test, than to race, which has long been considered a suspect classification." (p. 337) (2) Under the rational basis test which is the applicable standard in this case, the defendants did not violate the plaintiff's rights under the Equal Protection Clause, since there was no blanket exclusion of the blind from administrative positions. (p. 337) (3) Defendants did not violate plaintiff's right to equal protection in considering his blindness when making their decision. Defendants questioned plaintiff as to how he would handle the difficulties which would be caused by plaintiff's handicap and were not satisfied with the superficiality of the responses. (pp. 337-8) (4) Plaintiff has failed to establish a violation of Due Process since defendants did not have a policy embodying an irrebutable presumption of refusing to hire blind individuals as administrators but rather considered plaintiff's application and made an individualized decision that he was not qualified to be an administrator. (p. 338-9) (5) Due to the difficulty of the private cause of action and failure of the parties to brief the issue, this court will proceed to the merits of the case and assume plaintiff is entitled to bring an action directly under Section 504. Citing Davis v. Southeastern Community College, 99 S.Ct. 236 (1979). (p.340) (6) Since at the time of filing this lawsuit, administrative remedies were not available, palintiff is not now required to exhaust (p. 341). (7) There is no Section 504 violation as plaintiff is not an "otherwise qualified" individual as is required for coverage under the statute. (p. 341) (8) Pursuant to the decision in Davis, an "otherwise qualified" individual is "one who is able to meet all of a program's requirements in spite of his handicap." See 99 S.Ct. at 2367. Similarly,pursuant to 45 C.F.R. §84.3(k)(1), an "otherwise qualified" person is one who "with reasonable accomodation, can perform the essential functions of the job in question." Therefore, it was appropriate for defendants to consider the limitations of plaintiff's handicapping conditions. Plaintiff does not fall within the definitions of "otherwise qualified." (pp. 341-2) (9) The requirement of "reasonable accomodation" (45 C.F.R. §84.3(k)(1)) applies only if an individual is "otherwise qualified." The school district is under no obligation to make accomodations in order tha plaintiff, an unqualified applicant for employment, may become qualified. (p. 342). (10) As the California Constitution does not provide any greater protection than the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Court holds that plaintiff's rights under the California Constitution have not been violated. (p. 342-3). (11) The Court finds it unnecessary to consider the merits of the claim that the California Fair Employment Practices Act has been violated as plaintiff has failed to exhaust the available state administration remedies with respect to this claim.(p.343)

Winfield v. School Board of Fairfax County, No. 46028,
(Cir. Ct., Fairfax County, Va., 9/4/79) 3 EHLR 551:269
(Order and Plaintiffs' and Defendants' Briefs on Motion to
Dismiss)

Action by parent on behalf of his 14 year-old deaf child seeking a declaratory judgment to determine what constitutes an "independent educational evaluation" as required by P.L. 94-142, 20 U.S.C. §1401 et seq. Plaintiffs allege that an independent evaluation must be conducted prior to holding a due process hearing for purposes of determining the student's educational placement. Plaintiffs further allege that they were informed that an independent educational evaluation focused "on the evaluation of the child and not program issues, such as methods and materials used with the child." (p. 551: 270) Plaintiffs argue that pursuant to 45 C.F.R. 121a.500, which reads in part that an "evaluation means procedures used. . .to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs," defendant school board must provide plaintiffs with an independent evaluation which encompasses more than a determination of the child's handicapping condition. Plaintiffs argue that they are not required to begin to exhaust administrative remedies in seeking an appropriate education for minor plaintiffs until the independent educational evaluation is received. Defendants move to dismiss on the grounds that even if the action was properly before the court without having exhausted administrative remedies, the plaintiffs are not entitled to relief as it is the purpose of the Individualized Education Program and not the independent educational evaluation to specify the appropriate methods and materials to be used in a child's special education. Rulings (in denying defendants' motion to dismiss): Pursuant to P.L. 94-142 plaintiffs are entitled to an Independent Educational Evaluation at public expense, which includes both a determination that minor plaintiff is a handicapped child and also the nature and extent of the special education and related services needed by the plaintiff. (p. 551:273).

See Greth §5.5 ; Hoffman §5.5; Pierce §5.5; Adashunas §25; Benskin §62; Matter of Reid §140A; Lora 140C.1; M.R. §140C.2; Mason §140C.2; P-1 §140C.2; Panitch §140C.2; S-1 §140C.4; Grymes §140E; United Cerebral Palsy §140F.1; Bobbi J.§175C; Bd.Ed.Northport §190.

140C.1 Least restrictive environment

Concerned Parents and Citizens for the Continuing Education of Malcolm X (PS 79) v. The New York City Board of Education, #79 Civ. 6152 (RLC) (S.D.N.Y. 2/27/80) 3 EHLR 551:535

Class action on behalf of all children with emotional or learning disabilities attending PS 79 who have been transferred without notice or hearing to special education programs in other schools due to the closing of PS 79. The staff at PS 79 had developed an innovative educational program for handicapped children based on the concept of mainstreaming. Plaintiffs attending PS 79 were virtually totally integrated with nonhandicapped children and also received numerous supplemental services to meet their individual needs. With the closing of PS 79, plaintiffs were disbursed to other schools without notice or an opportunity for due process hearings and were placed in programs which afforded much less mainstreaming. Plaintiffs allege that the combined factors of the transfers (lack of mainstreaming, hostility to new students, etc.) caused emotional and educational setbacks. Rulings (in certifying the class and granting preliminary injunctive relief): (1) Since plaintiffs were not provided with notice of a right to a hearing, the exhaustion of administrative remedies requirement is not applicable. (p. 551:538) (2) Since the status quo must be maintained pending a due process hearing (citing Stuart v. Nappi, 443 F.Supp. 1235 (D.Conn. 1978) "if notice had been given, defendant would have had to keep PS 79 open for these children until after the due process hearing determination." (p. 551:538) (3) Defendants' transfer of plaintiffs "seem totally at variance with both the letter and spirit of the federal and state law designed to provide procedural protection for the handicapped ... and [to] support the development of educational practices which provide the handicapped with educational skills to help them develop their capabilities to the greatest extent possible." (p. 551:538) (4) Plaintiffs have met the standards for preliminary injunctive relief as they have demonstrated irreparable injury, the probability of success on the merits, and that the balance of hardships tips in their favor. (p. 551:538) (5) "Plaintiffs are entitled to special educational offerings at least on the level of those afforded at PS 79. Accordingly, defendants are ordered to prepare and structure a program for these displaced children in their new locations designed to provide mainstreaming, self-confidence building, help in dealing with psychological problems, and a healthy opportunity for integration with nonhandicapped." (p. 551:538) (6) Class certification is appropriate. (p. 551:538)

Dewalt v. Burkholder, C.A. No. 80-0014-A (E.D.Va. 3/13/80)
3 EHLR 551:550

Action by a 9 year-old multiply handicapped girl and her parents seeking to require defendants to place plaintiff child in a public school program for the hearing impaired. Plaintiff has a severe hearing loss, is "borderline" mentally retarded, has slight cerebral palsy and suffers from seriously delayed social-emotional development. She attended a public school program for the hearing impaired from May 1976 to March 1977, but was placed in Virginia School for the Deaf at Hampton by her mother (with approval from the public school) after advice from a private physician and other professionals. In October 1978 plaintiff's parents attempted to re-enroll her in the public school program. The area placement committee however determined that the public schools did not have an appropriate program. The results of administrative hearings on this issue indicated that plaintiff should remain in residential placement. Plaintiff's parents therefore bring this appeal pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.) and §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). Rulings (in dismissing the complaint): (1) Section 504 does not support a private cause of action for damages, but a private right of action for injunctive relief is probably available in view of 29 U.S.C. §794a(a)(2). However, injunctive relief is not available without exhaustion of administrative remedies. However, injunctive relief under §504 is not necessary here since any relief obtained under that statute would also be available under P.L. 94-142. (p. 551:551) (2) The school Board has "conscientiously" determined all the alternatives available for plaintiff and has determined that the Hampton School is the most appropriate placement. "After weighing the competing advantages of residential versus community/home environment, the court agrees that the school board's decision provided Christine [plaintiff] with the most appropriate education." (p. 551:553) (3) This determination resolves the least restrictive environment question as "only when alternatives exist must the Court reach the issue of which is the least restrictive." (p. 551:553) (4) All procedures which have been established to assure that a handicapped child is not removed from a regular educational environment except when the severity of the handicap requires it, have been satisfied. (p. 551:554) (5) While the court has deferred to "perceptive school officials," "[i]t is not an abdication of the statutory imposed fact-finding obligation of the court to accord such deference to those officials; it is merely an acknowledgment of the court's lack of expertise in the area. (p. 551:554)

Halderman v. Pennhurst, 612 F.2d 84 (3rd Cir. 1979)
Clearinghouse #12,902

Appeal from order, 446 F.Supp. 1295 (E.D.Pa. 1978), concerning operation of Pennhurst State School and Hospital, an institute for the mentally retarded which members of the plaintiff class claim is operated in an inhumane and dangerous manner in violation of the Eignth and Fourteenth Amendments, §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Developmentally Disabled Assistance and Bill of Rights Act ("DD ACT")(42 U.S.C. §§6001 et seq.), and Pennsylvania's Mental Health and Mental Retardation Act.

The district court had ordered the closing of Pennhurst and the placement of all its patients in suitable community living arrangements pursuant to individual habilitation plans. The district court had also provided for the appointment of a Special Master to oversee implementation of the order and established a "friend-advocate" program to represent class members in monitoring the provision of community living arrangements. Rulings, inter alia, (affirming in part and reversing in part): (1) The DD Act provides the mentally retarded with a right to treatment or habilitation. (p. 95) (2) Retarded persons have a private right of action under the DD Act. (p. 97) (3) This circuit has previously held that a private right of action exists under §504 (citing NAACP v. The Medical Center, Inc., 599 F.2d 1247, 1258-59 (3rd Cir. 1979)).(p.99) (4) The court rejects the notion set forth by the Fourth Circuit (U.S. v. Solomon, 563 F.2d at 1125) that the DD Act is enforceable only in state court. (p. 100) (5) The DD Act, and its legislative history, do not forbid institutions for the disabled per se since, for some patients, institutionalization might be appropriate. However, the DD Act does provide to mentally retarded persons the right to the least restrictive environment. For some patients, institutionalization is appropriate once adequate habilitation and living conditions are established, but the clear preference under the Act is for deinstitutionalization. (pp. 104-07) (6) The court declines to decide §504 arguments since the DD Act is sufficient to determine plaintiffs' claims. (p. 108) (7) It is not a violation of the Eleventh Amendment for a federal court to impose prospective injunctive relief even though such relief imposes financial burdens on the state (citing Edelman v. Jordan, 415 U.S. 651 (1974) and Quern v. Jordan, 440 U.S. 332 (1979)). (8) While a motion to intervene in order to protest the possible closing of Pennhurst was filed on behalf of some Pennhurst residents, certification of a class action for the purpose of determining liability was entirely proper. (p. 109) (9) While the trial court should have taken into account the interests of the dissenting members of the class, decertification was not necessary. The trial court can create a subclass to represent the dissenters but should, in any case, formulate relief which affords each patient an individual opportunity to participate in determining a habilitation plan. (p. 110) (10) Appointment of a master was appropriate relief and the scope of the master's powers was not overbroad. (p. 111) (11) The trial court erred in determining that Pennhurst could never provide adequate habilitation because of its very status as a large institution since, for some individual patients, Pennhurst may be an appropriate placement. (pp. 133-14) (12) "Whatever the [Fourteenth Amendment to the] Constitution requires by way of least restrictive alternatives, it does preclude resort to institutionalization of patients for whom life in an institution has been found to be the least restrictive environment in which they can survive."

(p. 115) (13) In implementation of the court's order, there should be a presumption in favor of placing individuals in community living arrangements rather than institutions.(p. 115) (14) Three judges *dissent* on grounds that, while improvement of Pennhurst is mandatory, a federal court should not dictate the type of treatment that best suits every individual (p.117); a statutory preference for the least restrictive environment does not create a mandatory duty. (p. 118); §504 is essentially a funding statute and should not have read into it a legislative mandate for deinstitutionalization (pp. 120-22); the residents' need for care and supervision can support significant restrictions on their personal liberty under the due process clause (pp. 123-26); classification of plaintiffs by institutionalizing them is reasonably related to a legitimate, compelling state interest under the equal protection clause. (p. 130)

Note: In a related case, the Third Circuit held that the trial court committed harmless error in denying a motion to intervene by the dissenting patients since they had participated as *amicus*: *Haldermann* v. *Pennhurst*, 612 F.2d 131 (1979).

In April, 1980, there was a petition for certiorari filed in United States Supreme Court in the *Pennhurst* Case. 48 U.S.L.W. 3702 (4/29/80)(Supreme Court docket nos. 79-1404, 79-1408, 79-1414, 79-1415)

Lora v. *Board of Ed. of the City of New York*,
456 F.Supp. 1211 (E.D.N.Y., 1978); *rev'd*
623 F.2d. 248 (C.A.2, 1981)

Class action on behalf of emotionally disabled Black and Hispanic students in need of special education who allege that special day schools for the emotionally disabled established by the school district are intentionally segregated "dumping grounds" for minorities forced into inadequate facilities without procedural due process protections. Plaintiffs allege that the referral and assignment of students to special day schools is conducted through the use of vague and subjective criteria which have a racially discriminatory effect and which violate Title VI of the Civil Rights Act of 1964; that they have been denied procedural due process, equal protection, and equal educational opportunity because they have been placed in special schools with the natural and foreseeable consequences that they will be racially segregated in unsuitable facilities; that due process has been denied by defendants' failure to provide reevaluations of students and failure to provide hearings prior to placement; that due process rights under the Education for the Handicapped Children Act have been denied; and that special day schools provide inadequate educational opportunity in violation of the Rehabilitation Act of 1973. *Rulings* (in favor of plaintiffs): (1) This is essentially a constitutional rather than a statutory case so defendants' strong reliance on exhaustion cases is inappropriate. (p. 8) (2) Emotionally disturbed children might be characterized as a suspect class but it is not necessary to do so since plaintiffs are entitled to suspect class status because of their race. (pp. 172-73) (3) "Procedural safeguards are premised on the assumption that the special day schools can afford therapeutic treatment for the properly diagnosed child. Recommendation for special school placement is justified on the ground that this type of environment is the most appropriate to the child's educational needs. Without adequate treatment, therefore, the rationale for confining children in the special day schools collapses. Plaintiffs are entitled to constitutional due process protections." (pp. 171-72) (4) Plaintiffs' right to treatment can also be found in the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. §§701 et seq. (p. 177) (5) Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, also serves as a statutory basis for the right to treatment (citing Lau v. Nichols, 414 U.S. 563). (p. 179) (6) "[T]he isolation of minority students in special education settings with small hope of truly fruitful education or movement into less restrictive environments constitutes a denial of equal protection..." and of the right to adequate treatment. (p. 176) (7) Plaintiffs are still required to prove intent to discriminate and the high proportion of minorities in the special day schools does not, in itself, require a finding for plaintiffs. All circumstances, including statistical data, must support an inference of intent to discriminate. (pp. 176-77) (8) Since private facilities for the emotionally disabled are used by a higher percentage of white children, there is a prima facie case of racial discrimination, which places the burden of proof on defendants to show that their actions can be explained in a manner consistent with the absence of segregative intent. (p. 185) (9) An unacceptable state of mind may be shown by action with intent to discriminate, failure to act with intent that the failure have a discriminatory effect, or by willful or even negligent disregard of the racial effect of an act or failure to act. (p. 190) (10) In the Second Circuit, so long as there is a foreseeable discriminatory effect, there need not be a finding of racial motivation. (p. 193) (11) "Where, as here, a regulatory scheme impartial in form results in an application predictable and foreseeably insidiously discriminatory in racial effect, the Constitution is violated," (198) with "benign motive" no justification for the discrimination. (p. 199) (12) Defendants' "argument that there is no right to notice and hearing prior to a change in educational setting is without merit, flying in the face of judicial pronouncement as well as the congressional and state policies outlined in the statutes and regulations." (p. 181) (13) "Use of surreptitious means to obtain parental consent for special day school placement by mailing uninformed parents forms which are signed without full realization of what is involved" constitutes a denial of due process. (pp. 181-82) (14) "Denial of plaintiffs' right to a hearing by not appointing a surrogate parent to represent the interests of the child should the parent disagree with the child's objection to placement or be disinterested in the matter" constitutes a denial of due process. (p. 182) (15) Failure to reevaluate students already placed in special schools without procedural protections, failure to carry out annual and triennial reviews of students as required by federal regulations, and failure to provide parents with clinical records upon which recommendations are made all constitute denials of due process. (pp. 181-82) (16) "Since proper evaluation is recognized as central to acceptable special education, a program falling substantially below minimum established standards would constitute a violation of the right to treatment." (p. 200) (17) A previous order of the State Commissioner of Education (see In the Matter of Reid, N.Y. Comm.Ed., Dec., No. 8742, 1973) that there should be a priority in favor of evaluating "unserved" children "does not constitute a valid justification for inadequate reevaluation amounting to a violation of constitutional and statutory rights." (p. 205) (18) The fact that low-income families are less able than middle-class families to assert their rights in the educational process does not present a cognizable constitutional claim although educators must guard against discrimination flowing from this discrepancy in ability. (pp. 197-98) (19) Defendants' system of notice in the evaluation and referral process is inadequate in that: (a) notice of referral for evaluation does not provide any detail of the steps involved in the evaluation, placement, or review process (p. 203); (b) there is no clear, coherent, fixed method of informing parents of their procedural due process rights (pp. 208-12); and (c) notice of procedural due process protections and the nature of the educational decision-making process is not at a sufficiently early point (p. 213). (20) "The current New York City fiscal crisis...provides no excuse for violations of plaintiffs' rights," but is of import in formulating relief. (p. 222) (21) The parties will meet with the Court to formulate a decree which the Court suggests shall consist of: (a) a system of reevaluation and reconsideration for children who have not had their cases reconsidered under the new system of procedural due process protections (p. 226); (b) notice to school employees of problems of discrimination in special education and affirmative efforts to protect and involve parents in educational decision-making (p. 227); (c) in-house training to obtain uniform and bias-free approaches to mainstreaming (p. 227); (d) an independent advocate or ombudsman system for parents and children being considered for or assigned to special day schools (p. 228); (e) development, with communications experts, of readily understandable explanations to parents and children of their rights (p. 228); (f) periodic reporting to the Court (p. 229); and (g) efforts to obtain additional federal or state funding (p. 229).

Lora v. Board of Ed. of the City of New York,
456 F.Supp. 1211 (E.D.N.Y.,1978); rev'd
623 F.2d 248 (C.A.2, 1981)

Appeal by the Board of Education of the City of New York from an order of the District Court, 456 F.Supp. 1211 (E.D.N.Y. 1978) directing defendants to remedy the alleged violations of constitutional and statutory rights which had occurred due to the school district's creation of special day schools for the emotionally disturbed which allegedly serve as intentionally segregated "dumping grounds" for minorities in need of special education. Rulings (affirming in part, vacating and remanding in part): (1) The district court's order as to individualized education programs and due process documents is affirmed (p. 3257) (2) Title VI, under which this action is brought, prohibits only "purposeful discrimination." See Board of Education v. Harris, 100 S.Ct. 363 (1979)(p. 3257) (3) The standards in Dayton Board of Education v. Brinkman, 99 S.Ct. 2971 (1979) and Columbus Board of Education v. Penick, 99 S.Ct. 2941 (1979) in which the court held that "'foreseeable result'" is one type of quite relevant evidence of racially discriminatory purpose but, standing alone is not sufficient to establish the requisite discriminatory intent on the part of the Board,"are applicable to this case. (pp. 3257-8). (4) "[A] discriminatory purpose as a motivating factor must be found to conclude the existence of a constitutional violation." (p. 3258) (5) "[I]nferences from evidence of discriminatory impact will not substitute sufficiently for a finding of actual motivation in concluding that constitutional violation has occurred." (p. 3258)

(6) "Foreseeability *per se* is insufficient since foreseeability may be helpless and unintentional." (p. 3259) (7) Until the essential facts of this case are found using the appropriate standards, "the elimination of sections of the order attributable only to a finding of intentional racial discrimination cannot be addressed properly." Therefore this case is vacated and remanded for further proceedings in order to be able to present the appellate court with clear and complete findings of fact. (pp. 3259-60). (8) J. Oakes, *concurring in part*: Because *Lau* v. *Nichols*, 414 U.S. 563 (1974) has not been over-ruled, therefore until there is further clarification from the Supreme Court, standards on intent are unclear. Thus, more specific findings are probably preferable.

Note: The court recommends consolidation of this case and *Jose P*. v. *Ambach*. on remand.

New York Association for Retarded Children, Inc. v. *Carey*,
466 F.Supp. 479 (E.D.N.Y. 1978) 3 EHLR 551:104, Clearinghouse #7908

Class action on behalf of mentally retarded residents of Willowbrook Developmental Center who had been placed in public schools and then excluded because they were carriers of serum hepatitis (hepatitis B). The Willowbrook students had been placed in public schools in an effort to provide them with an education in the least restrictive environment. After discovery that 42 of these children were carriers of serum hepatitis, the New York City Department of Health issued guidelines for the management of these children in special education classes. Special provisions were made to insure hygenic conditions and at the same time provide these handicapped children with an education in the least restrictive environment by allowing them to continue to attend public school. The New York City Board of Education rejected these guidelines and developed exclusionary policies which would keep the carriers out of public education or in developmental centers for an indefinite period of time. The Board alleged they could not comply with the Department of Health guidelines due to parental pressure and fear of publicity and lawsuits, but did not intend to exclude non-handicapped hepatitis carriers. Action brought pursuant to Section 504 of the Rehabilitation Act of 1973 and P.L. 94-142, 20 U.S.C. §1401 *et seq*. and NY Educ.L. §4402(2)(a). *Rulings* (in granting injunction): (1) A private cause of action exists under §504. (p. 486) (2) "The risk of contagion of hepatitis B among mentally retarded children is not substantial enough to justify their discriminatory exclusion from public school." (p. 486) (2) A private cause of action exists under Section 504 as "where time is of the essence in insuring that these mentally retarded children are provided adequate programs. We believe it unwarranted to defer to administrative enforcement of the statute, as might otherwise be required." (p. 486) (3) In giving a last minute notice to parents of their children's educational placement change and granting a 60 day waiver of the Commissioner of Education's regulations with respect to hearings, the Board of Education has violated 20 U.S.C. §1401 *et seq*. (p. 486) (4) The Board of Education's decision violates the provisions of the Consent Judgment which allowed transfer of Willowbrook students to public schools as well as the children's rights to equal protection and due process of law. (p. 486) (5) Defendants are ordered to "readmit the excluded members of the Willowbrook class to the public school system in accordance with the procedures utilized for the general student population as a whole." (p. 487).

New York Association for Retarded Children, Inc. v. *Carey*,
466 F.Supp. 487 (E.D.N.Y. 1978), 3 EHLR 551:138,
Clearinghouse #7908

Following the issuance of the injunction (above) by the district court the Board of Education formed a task force to develop a plan which was consistent with the Department of Health guidelines; under the new plan the Board proposed that the carriers be reassigned to nine newly-created special education classes composed solely of mentally retarded hepatitis carriers. The Board allegedly guaranteed that under this plan the children would be assured an appropriate education in these segregated classes. This action seeks a declaratory judgment to establish the validity of the Board's newly proposed plan. *Rulings* (in rejecting the Board's plan): (1) Jurisdiction of this court under, *inter alia*, 20 U.S.C. §1415(e) is appropriate and a declaratory ruling is a desirable mechanism for resolving this dispute. (p. 490). (2) The transfer of children to new schools and programs may be a disruption which would have a serious effect on the handicapped students. (p.493-4) (3) The reduced class size will limit interaction with children from non-institutionalized backgrounds and non-handicapped children. (p.494) (4) By placing students in small classes only because they are hepatitis carriers and grouping them by age, rather than ability, the students will be with others of different developmental levels and individual needs. . ."such cross-categorization will limit the use of instructional aids, techniques, and group activities which more homogenously composed classes employ, and it may prove deterimental to the education of not only the less developed students but also those who are more advanced." (p.494) (5) Students will not be able to participate in non-academic activities with non-handicapped children or children in other special education programs, "thus severely limiting the potential of these children to benefit from peer contact and from association with more highly developed children," both of which are recognized as essential.(p.494-5) (6) Students will be placed in programs inconsistent with the requirements of their I.E.P.s. (p. 494) (7) "The stigma caused by isolating these children as hepatitis B carriers may traumatize them and impair the continuity of their learning process, resulting in some cases in actual regression in personal and educational development." (p.495). (8) "Segregation of hepatitis B carriers will hamper, if not undermine, employment and community placement efforts on behalf of mentally retarded individuals generally and these children specifically, thereby imposing for an indefinite future period an additional burden on persons who, by virtue of their handicap are already overburdened." (p. 495) (9) The Board's plan would prevent the children in question from receiving an education in the least restrictive environment. (p.496-7) (10) Given testimony indicating that the new plan raises grave questions about the appropriateness of the placements which would result,the court must look to whether "the proposed segregation of carrier children, with its resultant educational disadvantages, is jutified to protect the health and welfare of the non-carrier retarded children." (p. 497) (11) "In view of the availability of less drastic prophylactic measures which might be adopted. . .the proposed segregation seems an unwarranted and unnecessarily restrictive reaction to the purely theoretical risk of transmission that the Board has shown." (p. 500) (12) "The segregation of retarded hepatitis B carriers without imposing a similar restriction on non-handicapped persons would constitute unlawful discrimination within the meaning of the Rehabilitation Act [of 1973] and 84.4(b) of the regulations." (p. 502) (10) ". . .The plan if effectuated, would violate the obligations of the Board (i) to educate the children in the most integrated setting appropriate to their needs (§84.4(b)(2)), (ii) to provide an appropriate education designed to meet the individual needs of handicapped children to the same extent that those of non-handicapped children are met (§84.33(a)), and (iii) to ensure that the handicapped children participate with non-handicapped persons to the extent appropriate to the needs of the carrier children affected (84.34(b)). (p. 502-3). (13) The Board's showing of a purely theoretical risk of spread of hepatitis B is insufficient to offset the "weighty countervailing educational needs of the affected children." (p. 503) (14) "Careful attention to hygenic practices, proper classroom management and structure, and increased training of teachers and staff are sufficient to substantially reduce the risk of transmittal and obviate the claimed necessity for separation." (p.503) (15) The segregatory policy proposed by the Board would violate 20 U.S.C. §1401 *et seq*. and New York Education Law, §§4401 *et seq*. (p. 504) (16) The Board's plan, in that no group other than the mentally retarded has been tested for hepatitis "is without rational basis and the application of its provisions would constitute patent discrimination in violation of the rights of 48 carrier children to equal protection of the laws." (p.504).

New York State Association for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2nd Cir. 1979) Clearinghouse #7908

Appeal of decision forbidding Board of Education from segregating mentally retarded children who are carriers of serum hepatitis from regular school classes. The Board contends that judicial review of state and local administrative agencies' decisions should be limited to a standard of reasonableness. *Rulings* (in affirming): (1) The standard of review of state and local administrative decisions should be derived from the constitutional and/or statutory provisions which are involved (p.649) (2) "A standard dispositive of this case is properly derived from the Rehabilitation Act of 1973." (p.649) (3) Section 504 is part of the general body of discrimination law; under that law, "once the plaintiff has established a *prima facie* case that he has been discriminated against, the defendant must present evidence to rebut the inference of illegality." (p.649) (4) "Clearly deference to a state agency's fact-finding is inappropriate once that agency is the defendant in a discrimination suit. The agency is required to come forward in the district court with sufficient evidence to rebut the plaintiff's *prima facie* case." (p.649). (5) The Board has failed to make a substantial showing in court that its plan is justified. (p. 650) (6) While a governmental agency is not legally required to choose between attacking every aspect of a problem at one time and may institute a step-by-step approach, the latter approach is not appropriate when the program involves guaranteeing some, but not all, of those with an allegedly infectious disease. (p. 650) (7) "The Board is not barred from returning to court at some point in the future when it has evidence to support any plan appropriate to a significant health risk." (p. 651).

Note: In discussing the burden of proof to be assigned under Section 504, the court indicates that, although the legislative history is sparse, the statute was enacted within a few months after the Supreme Court's decision in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) (nondiscrimination provisions of Title VII), which is the source of the court's definition of the burdens here. (p. 649, n.5) The court goes on to indicate that it will not define the precise level of scrutiny that may be appropriate for the variety of contexts in which claims arise under §504. (p. 650).

Pennhurst v. Halderman, 49 U.S.L.W. 4363 (4/20/81)

Litigation seeking to deinstitutionalize the 1200 residents of a state hospital and school for the severely and profoundly retarded. The district court found the institution to be dangerous and inadequate for the purpose of serving the residents' constitutional and statutory right to "minimally adequate habilitation" in the "least restrictive environment." 446 F.Supp. 1295 (E.D.Pa. 1977). The appellate court substantially affirmed. 612 F.2d 84 (3rd Cir. 1979) Rulings (in reversing and remanding): (1) Neither the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6000 et seq., nor its legislative history indicate that Congress intended to require the states to assume the high cost of providing "appropriate treatment" in the "least restrictive environment" to their mentally retarded citizens. (p.4367) (2) The D.D. Act does not embody rights and obligations pursuant to Fourteenth Amendment requirements; the Act is a mere federal-state funding statute designed to assist the states in improving the care and treatment of the mentally retarded. (pp.4367-68)
(3) The enumeration of rights in 42 U.S.C. §6010 "does no more than express a congressional preference for certain kinds of treatment." (p.4368) (4) The fact that Congress rejected an alternative which would have permitted the termination of federal funding to states which failed to comply with the Act establishes that the provisions of §6010 were intended to be "hortatory, not mandatory." (p.4369) (5) The small appropriations available under the Act are further proof of the discretionary nature of the legislation. (p.4369) (6) Congress included no language in the Act clearly putting the states on notice that receipt of funds under the Act would result in particular obligations. (p.4369) (7) The Department of Health and Human Services has never interpreted the Act as requiring affirmative obligations. (p.4369). (8) The Act requires a habilitation plan only when the federal aid available under the Act is used to finance a portion of the cost of habilitation services to the developmentally disabled person. (p.4369) (9) A state plan for funding under the D.D. Act with assurances of compliance with the rights set forth in the Act, as required by the statute, would be unnecessary if all state programs were required to fund the rights set forth in §6010. (p.4370) (10) The Act does not require deinstitutionalization of most, if not all, mentally retarded persons. (p.4370) (11) Because §6010 confers no substantive rights, there is no need to reach the question of whether there is a private cause of action under that section or under 42 U.S.C. §1983 (p.4370, n.21). (12) The case is remanded to the Circuit Court so that it might address the issues of whether individuals can, under §1983, bring suit to

compel compliance with those conditions which are set forth in §6011 and §6063(b)(5)(C) and to determine whether Pennsylvania state law contains a right to treatment. (pp.4370-71). (13) The D.D. Act "establishes a national policy to provide better care and treatment to the retarded and creates funding incentives to induce the states to do so. But the Act does no more than that. We would be attributing far too much to Congress if we held that it required the states, at their own expense, to provide certain kinds of treatment." (p.4371) (14) Blackmun, *concurring in part and concurring in the judgment*: (a) One institution which does not directly receive federal funds under the Act should not be exempt from the Act's requirements when the institution is part of one administratively unified system since such an approach would allow a state to insulate substandard institutions from federal requirements merely by allocating federal funds to acceptable ones; (b) "That private parties, the intended beneficiaries of the Act, should have the power to enforce the modest legal content of §6063 would not be an unusual application of our precedents, even for a legislative scheme that involves federal regulatory supervision of state operations." (p.4371) (15) White (joined by Brennan and Marshall) *dissenting in part*: (a) Section 6010, as confirmed by its legislative history, "was intended by Congress to establish requirements which participating states had to meet in providing care to the developmentally disabled." (p.4372) (b) Section 6010 was enacted pursuant to Congress' spending power, and not pursuant to its power under the Fourteenth Amendment; as such, the Act was not intended to place duties on states independent of their participation in the program established by the Act. (p.4372). (c) "That Congress was deadly serious in stating that the developmentally disabled had entitlements which a State must respect if it were to participate in a program can hardly be doubted." (p.4372) (d) Jurisdiction under 42 U.S.C. §1983 is proper here given the standards set forth in *Maine* v. *Thiboutot*, 448 U.S. (1980). (pp. 4376-77)

Sherer v. *Waier*, C.A. No. 78-0510-CV-W-4, W.D. Mo.,
Order, 9/18/78

Action seeking mainstreaming of special education student, rather than placement in segregated classroom for orthopedically handicapped pupil, and provision of "intermittent catheterization services and physical and occupational therapy which plaintiffs allege are necessary to permit [student] to benefit fully from her education." Plaintiffs claims are based on the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq.* and its implementing regulations, 45 C.F.R. Part 121a, the Fourteenth Amendment, and Missouri law. Plaintiffs also seek to have federal and state educational aid withheld from the North Kansas City School District due to alleged non-compliance with federal and state law. *Rulings* (in dismissing certain claims): (1) Exercise of pendent jurisdiction is declined, in part because full relief could be given based upon the basic federal statutory claim (p. 4) (2) The Fourteenth Amendment claim is dismissed based upon a decision in an earlier action in which the same claim was dismissed. (p. 4) (3) The claims seeking withholding of financial aid are dismissed because there is no determination that the defendants have violated the law. (p. 5)

Note: The basic federal statutory claim was not dismissed.

Willie M. v. Hunt, Civil No. CC 79-0294, W.D.N.C., Charlotte Div., Statement of Law in Support of Plaintiff's Motion for Preliminary Injunctions, Brief in Support of Plaintiffs' Motion for Class Certification, Order (9/4/80); Second Set of Stipulations (9/2/80); Third Set of Stipulations (9/26/80); Plaintiffs' Proposed Provisions in Addition to Parties Third Set of Stipulations; Defendants' Proposed Orders (Clearinghouse #28,878)

Action on behalf of all juveniles of the state of North Carolina who are being held in non-criminal custody, including involuntarily committed mental patients and juveniles in training schools, seeking to enforce their right to appropriate treatment and education. Plaintiffs allege that they are being denied treatment and education in the least restrictive environment as guaranteed to them under the Federal Constitution and federal and state statutes. As to the education issues, plaintiffs allege they have a right to appropriate education and related services in the least restrictive environment appropriate to their needs pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.) and N.C. Gen. Stat. §115-363 et seq. Plaintiffs also seek class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Rulings (as to the education issues): (1) Class certification is granted, the class consisting of those children who have or will in the future suffer from serious emotional, mental or neurological handicaps which are accompanied by assaultive or violent behavior and are, or will be in the future, involuntarily institutionalized or otherwise placed in a residential program. (pp. 1-2) (2) Plaintiffs have a right to a free appropriate public education in the least restrictive environment pursuant to both state and federal law. (3) Each plaintiff shall be provided habilitation, including education, suited to his/her needs, "which affords him a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capabilities permit. . ." (p.3) (4) "Each plaintiff shall be provided such placements and services as are actually needed as determined by an individualized habilitation plan rather than such placement and services as are currently available. (5) Defendants agree that the habilitation program for an individual plaintiff may continue for a reasonable period beyond his eighteenth birthday if the individual continues to be in need of such treatment and will benefit from continuing placement. (p.4) (6) An independent panel of experts in treatment and education shall be established to review and make recommendations with respect to development of appropriate treatment and education plans and programs.

See Mattie T. §140B; Age §140C.1; Campbell §140C.2; Mason §140C.2; P-1 §140C.2; Pehowaski §140C.2; Stuart §140C.4; In the Matter of the "A" Family §140C.6; Tatro §140C.6; New York A.R C. §140D; Brown §140E; Concerned Parents §140E; Cruz §140F.3; New York A.R.C. §140F.3.

Age v. Bullitt County Public Schools, No. C78-0461-L(B) (W.D.Ky. 1/11/80) 3 EHLR 551:505

Action by a 10-year-old hearing-impaired child seeking to compel the school district of his residence to pay the costs of educating him in a special education program at a neighboring school district. Plaintiff was originally placed in a program outside his school district as his district offered no programs for the hearing impaired. Defendants then attempted to place plaintiff in their newly developed program. Plaintiff's parents objected alleging that defendants could not provide an adequate oral/aural program for their child since the other two students who would be in his program would be receiving instruction in the total communication method for the hearing impaired and because plaintiff would have no interaction with his nonhandicapped peers during academic studies. Such a program was being produced at the neighboring district. After exhaustion of administrative remedies plaintiff brings this action pursuant to P.L. 94-142, 20 U.S.C. §1401 et seq. Rulings (in granting injunctive relief): (1) "The Court is persuaded that the intent of the Act is to furnish the optimum in the way of education to those to whom nature has dealt less than a full hand." (p. 551:506) (2) As plaintiff would be the only student receiving oral/aural training in the program developed by the defendants he would not receive interaction with his peers during his academic studies. As this contact is extremely important, defendants' program is not "appropriate" as is required by P.L. 94-142. (p. 551:506) (3) Defendants must defray the costs of having plaintiff educated in the neighboring school district's program until such time as defendant school district has established an appropriate oral/aural method involving a sufficient number of plaintiff's peer group to afford him the interaction he needs. (p. 551:506).

Note: The court defines the various training methods for the deaf. "The oral/aural method was described by eminently qualified witnesses as a program which utilizes lip reading and the residual capacity of a child, together with such instruments of amplification (hearing aids) as are suitable for the child. The purpose sought to be accomplished is to teach the child to think in words and to teach him to communicate through speech. The other accepted method - the total method - involves finger letters and sign language, in addition to the use of residual hearing and lip reading. It is more suitable for the profoundly impaired. (p.551:505, n.1).

Allen v. McDonough, Super.Ct. No. 14948, Mass. Superior Court, Suffolk County, Complaint, 6/10/76, Consent Decree, 6/23/76, Supplemental Consent Decree, 9/17/76 (Clearinghouse #s 18,634A-C)

Class action against Boston school officials on behalf of children waiting to be placed in special education programs and children who have been placed in programs and who have not received review of their educational progress, to enforce the Massachusetts special education law, Chapter 766 of the Acts of 1972, M.G.L. c.71B, and implementing regulations. Seeking declaratory and injunctive relief, plaintiffs allege that defendant school officials have violated Massachusetts statutory and regulatory provisions by failing to provide within thirty school working days educational plans for children recommended for special education, and by failing to evaluate and review within ten months the educational progress of students placed in special education programs. In the first consent decree, defendants agreed to provide educational plans and program review to the named plaintiffs and members of the class as necessary, provided that the total number of such children served does not exceed 1713. Class members are to be served within 45 calendar days. The decree also provides for notice to the members of the class, regular reporting provisions on progress in compliance, and that defendants in providing services to the members of the class need not spend in excess of $600,000. The supplemental consent decree provides in part for general compliance with the legal requirements on educational plans and reviews; that certain required notices to parents shall identify "agencies that offer advocacy services"; that defendants shall file by September 30, 1976, a detailed plan for compliance with the supplemental decree; and that defendants shall make regular reports on compliance.

Allen v. McDonough, Superior Ct. No. 14,948, Suffolk Cty., Mass.,
Motion for Contempt Finding, 10/27/76
(Clearinghouse #18,634F)

Motion to cite the members of the Boston School Committee for contempt in class action seeking enforcement of the Massachusetts special education law, M.G.L. c. 71B. In earlier orders, including two consent decrees, the system was required to provide educational plans for special needs students and to review the progress of such students, who had received placements, within designated periods. Plaintiffs allege that reports filed by the system show non-compliance with requirements on providing special education services, reviewing the progress of students placed in special programs, and reorganization of the department serving special needs students.

Allen v. McDonough, Superior Ct. No. 14,948, Suffolk Cty., Mass.,
Plaintiffs' Further Contempt Motion, 2/14/77

Further contempt motion. Plaintiffs seek orders requiring defendants to show cause why they are not in contempt, and providing for damages of "not less than fifteen dollars per school day..." for each child denied, after March 1, 1977, the services required under the earlier orders.

Note: The two preceding summaries of the Allen case highlight a general problem in education and other poverty law cases, namely, the enforcement of decrees. Michael Lottman, an attorney with litigation experience in such cases, has written a useful article on this question. See "Enforcement of Judicial Decrees: Now Comes the Hard Part," Mental Disability Law Reporter, July-August, 1976, pp. 69-76. The article deals with the general problem of converting the promise of a broad remedial decree to substantive program change. While the focus of the article is cases involving institutions for the mentally disabled, the discussion is relevant to other kinds of cases. The article discusses the following remedial techniques: "Retention of Jurisdiction"; "Reporting Requirements"; "Access to Grounds and Records"; "Ombudsmen and Lay Advocates"; "Human Rights Committees"; "Review Panels"; and "Special Masters." It concludes by outlining "certain necessary elements of an effective compliance mechanism."

Allen v. McDonough, Superior Ct. No. 14,948, Suffolk County, Mass., Judgment, 10/11/77 (Clearinghouse #18,634)

Remedial judgment in action in which court ruled that the members of the Boston School Committee were in civil contempt for failure to implement consent decrees concerning the Massachusetts special education law, Chapter 766 of the Acts of 1972, M.G.L. c.71B. The court also ruled that plaintiffs' counsel were entitled to an award of attorney fees. The provisions of the decree include the following: (1) Compensatory services, shall, in general, be available to pupils denied court ordered entitlements for more than 60 days. (2) The defendants shall initiate and the plaintiffs shall participate in the identification of pupils entitled to compensatory services. (3) Compensatory services shall include programs such as "a. increasing the intensity of special services provided to the child; b. increasing the teacher-pupil ratio for the special services the child is to receive; c. adding a vocational, recreational and/or enrichment component, after school and/or on weekends; d. providing extra tutoring to the child, after school, on weekends and/or within the regular classroom; e. continuing to offer special services after a student has obtained a high school diploma or its equivalent or has reached age 22; f. providing comprehensive (academic, vocational, recreational and/or enrichment) special services during the summer of 1978, or any other reasonable appropriate measure." (4) Parents may accept or reject "the compensatory program proposed by defendants...." "The dispute concerning the appropriateness of the compensatory program offered to a particular child shall be resolved by [the] Court." (5) The court will appoint "one or more persons who are expert in special services...who shall be compensated by defendants to monitor and evaluate the implementation of the compensatory programs, and to file periodic reports with the Court." (6) Plaintiffs' counsel are awarded attorneys fees at the rate of $30 per hour, and in two instances costs, as follows: $12,570 (foundation funded program), $8,550 (state support center), and $7,860 (local legal services program).

Allen v. McDonough, C.A. No. 14948, Superior Court, Suffolk County, Mass., Further Order (Clearinghouse #18,643K)

Further order addressing the continuing failure of the Boston school system to comply with Massachusetts law concerning services for special needs pupils (Chapter 766 of the Acts of 1972). Provisions of order (including program of compensatory services and appointment of special monitor): (1) The system shall implement in the period from October 13, 1980 to June 8, 1981, a program of "compensatory special education services" for students whose rights the system denied duirng 1979-80, by failing to provide timely evaluation meetings, educational plans, reviews, or services, including transportation services. (pp.1-2, 4) (2) Services, pursuant to "an individualized compensatory education plan," may include "(a) vocational, counseling, recreational and enrichment services, after school and on Saturdays, (b) tutorial and ancillary services, after school and on Saturdays; and (c) special services after a student has obtained a high school diploma or its equivalent or has reached age 22. "Defendants shall afford the parents an opportunity to . . .participate in the choice and content of the compensatory program," which shall consist of "not less than two one-hour sessions during the week or one four-hour session (including free lunch)and on Saturdays." (pp.3-4) (3) Defendants shall report to plaintiffs the names of the students entitled to services and notice shall be given to their parents and appropriate schoolpeople and service providers. (pp.2-3) (4) The court will appoint "an independent monitor" whose function, in general, shall "be to determine the most effective methods for the functioning of the special education programs. . ." The School Committee shall provide $100,000 for the salary and expenses of the monitor and his staff. In addition, the sums of $100,000 and $150,000 shall be provided in fiscal 1981 and 1982, respectively, for a study and recommendations concerning "defendants' procedures and practices that may be responsible for their non-compliance with the Orders of [the] Court. . . ." (pp.4-6) (5) The monitor shall review and report on defendants' compliance with the court's orders, "meet monthly with an advisory group of parents. . ." and "periodically with representatives of each of the parties," and respond to any party's "written request. . .for a specific action or recommendation." The monitor may make "informal suggestions" to the defendants' "formal recommendations with regard to implementation of the [Court's] Orders. . . ." (pp.6-8) (6) Defendants shall pay $15,000 for plaintiffs' attorneys' fees for the period September 1, 1979 to August 1, 1980 (exclusive of those concerning a matter pending as to transportation of pupils).(p.9)

Anderson v. Thompson, 495 F.Supp. 1256 (E.D.Wis. 1980)

Action by parents of a 13-year-old handicapped child seeking review of the special education placement decision regarding their child made by the defendant school district and modified by the State Superintendent of Public Instruction. Plaintiff was placed in a private school for children with special educational needs. Defendants recommended that she be placed in a classroom for the educable mentally retarded with eventual mainstreaming into the regular first grade. Plaintiffs however rejected this proposal. A subsequent evaluation of plaintiff several years later again recommended her placement in an EMR classroom. Plaintiffs again rejected this proposal. Pursuant to §115.81 Wis.Stats., they appealed the placement offer to the local school board. The hearing examiner found that plaintiff had a speech and language disability but was not learning disabled or retarded. The report,however,held EMR placement was appropriate since it offered all the components necessary for the development of a program appropriate to Monica's needs. Plaintiff appealed this decision to the State Superintendent of Public Instruction. The Superintendent also found EMR placement appropriate for plaintiff even though she was not found to be mentally retarded on the theory that the program could be tailored to meet her individual needs. Plaintiff agrees that she should be placed in the public school but they do not agree with the details of the program which will be provided to her. The parties are also in disagreement over the nature of the transition program from the private school to the public program. Plaintiffs are also seeking to prevent plaintiff from being labelled emotionally disturbed. Finally, plaintiffs are seeking reimbursement for the costs of this action, including attorneys fees, the costs of the previous hearing before the hearing officer, and the appeal to the Superintendent of Public Instruction and the cost of sending plaintiff to the private school. They bring this action pursuant to 20 U.S.C. §1415(e). Rulings (for plaintiffs): (1) The role of the court in reviewing administrative decisions "is not to affirm or reverse a state administrative decision, nor even to remand with instructions, but rather itself to come to a decision as to the appropriate placement and programming to carry out the mandate of the federal Act." (pp.1260-61). (2) There is no purpose served by freezing the evidence at the moment in time when the final state administrative decision was rendered. Since three years have passed since the superintendent's decision was rendered, all information since that time as it bears upon plaintiff's needs will be considered as evidence. (p.1261). (3) The evidence presented indicates that plaintiff is an emotionally disturbed child. (p.1263). (4) An I.E.P. formulated by the court, but incorporating suggestions from the parties, is mandated for the school district for the coming school year. (p.1265). (5) If plaintiffs continue to refuse the program and placement offer, then the obligations of the school district to plaintiff for the school year are at an end. (p.1265) (6) "This Court finds the reasoning in the Armstrong [476 F.Supp. 383 (E.D.Pa. 1979)] decision persuasive and entirely consistent with the language of the federal Act and, therefore, concludes that a free appropriate public education may in some cases include year-round educational programming. Whether it does in a particular case will vary with the needs of the particular child, but where it is required, then federal law imposes on the local educational unit wherein the child resides the obligation to provide such an education." (p.1266) (7) While it would be beneficial, plaintiff is not in need of a summerlong program to aid her in the transition into public school since she has continued to progress academically from year to year despite the lack of summer school programming and she is now at the age where she must learn to adjust to changes. (p.1266) (8) In order to provide for a smooth transition to public school, plaintiff should be allowed to attend private school part-time and the public school part-time until it is established that plaintiff is adjusting well to the public school. (9) The public school must pay the cost of transportation to and from and her tuition at St. Francis (private school) during the transition period. This is based on the Court's theory that the time spent at St. Francis during the transition period is in the nature of a supportive service to assist plaintiff to benefit from the education provided by the public school. (p.1268) (10) A prevailing party is not entitled to an award of attorneys fees except where specifically authorized by statute. There is no specific authorization in P.L. 94-142 and the regulations (45 C.F.R. §121a.506(c)) suggest that the omission was an intended omission and the award of fees was not part of the Congressional scheme. (p.1268) (11) Attorneys fees may be awarded when the losing party acted in bad faith. There is no indication here, however, that the school district or any other parties acted in bad faith. (o.1269). (12) The court has no authority to grant attorneys fees under the private attorney general theory. This is instead one of Congress' roles. (p.1269) (13) There is no private cause of actioh for damages under P.L. 94-142 (p.1269). (14) Since plaintiffs are the "prevailing party" they are entitled to recovery of the standard items of costs allowed by 28 U.S.C. §1920 (p.1270).

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Bryan D. v. Davenport Community School District, C.A. No. 79-66-D-1, Class Action Complaint, Motion for Leave to File Brief as Amicus Curiae; Motions to Dismiss 6/28/79, Brief in Support of Motion for Temporary Restraining Order 5/30/79, Temporary Restraining Order 5/30/79. (S.D. Iowa)

Action by a 17-year-old mentally retarded child for defendants' failure to provide him with a free appropriate public education until age 21 and failure to provide him with the due process guarantees of a fair hearing and right to appeal. This action is brought as a class action on behalf of plaintiff and all other students similarly situated. Plaintiff alleges that defendants have failed to provide plaintiff and others with a free appropriate public education in that: they have failed to formulate adequate individual education plans; they have failed or refused to provide special education up to age 21; they have failed to provide types of programming such as physical education which are available to non-handicapped students but not handicapped students; they have failed to provide 12-month per year education for students whose handicaps require it; and they have failed to provide federally mandated non-academic supportive services. (see p.8) Plaintiff further alleges that defendants have failed to provide procedural safeguards in that they have failed to give prior written notice of their intended actions; they have failed to give notice of the grounds for their proposed actions; they have failed to give notice of the students' rights to appeal; they have failed to give notice of students' procedural rights on appeal; they have failed to provide impartial due process hearings in cases of appeal and they have failed to maintain the students' current placement pending the outcome of appeal. (see p.9) Plaintiff finally alleges that defendants have knowingly and intentionally extended educational options to severely and profoundly handicapped students but have not made these options available to less severely handicapped students such as plaintiff. Plaintiff brings action pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.); Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. §794); the Fourteenth Amendment; and the Supremacy Clause of the United States Constitution and Iowa Code Chapter 281 seeking a preliminary and permanent injunction ordering defendants to prepare IEPs for the plaintiff and the class, place plaintiff and class members in free appropriate programs of education, to cease and desist from graduating special education students prior to age 21 who are in need of further education, to provide year-round programming when appropriate, and to prevent defendants from making placement decisions without notice and an opportunity for an impartial due process hearing. Rulings (in granting motion for a temporary restraining order): "[I]t appears there is good cause for the issuance of the restraining order in that plaintiff will be harmed by graduation which effectively terminates his program and precludes review of his individual education resulting in delay of his education." (p.1)

Campbell v. Talladega County Board of Education and Board of Education of the State of Alabama,
C.A. No. 79-M-277, N.D.Ala., Opinion, Judgment
3/31/81.

Action by an 18 year old severely retarded student who charges that he has been denied a free appropriate public education in violation of his rights under the Education for all Handicapped Children Act (EHA), §504 of the Rehabilitation Act, 42 U.S.C. §1983, and the due process and equal protection clauses of the Fourteenth Amendment, U.S. Const. Plaintiff seeks declaratory, injunctive, and monetary relief. Rulings: (1) The determination of "appropriateness" is a proper judicial function. Based on the legislative history of the EHA, an I.E.P. must at least embody practical objectives, i.e., an education for each handicapped child that would enable the child to be as independent as possible from dependency on others, would enable the child to become a productive member of society, and would promote academic achievement by the child that would approximate that of his/her nonhandicapped peers. (pp.9-10) (2) Plaintiff's educational program "fails in design and execution to further his progress in attaining such self-sufficiency as he may be capable of. . ." and, at present is devoid of educational justification. Because said program is ill suited to impart to plaintiff any functional or communicative skills which might increase his independence, it fails to meet "even a minimally stringent standard of appropriateness."

(pp.10-11). (3) Since plaintiff has virtually no contact with nonhandicapped students outside of his lunch period, he is not placed in contact with nonhandicapped students to the maximum extent consistent with an appropriate education program. (p.11) (4) The State of Alabama, having elected to receive federal funds, must comply with the Congressional mandate to integrate handicapped children to the greatest extent possible with nonhandicapped peers. Considerable evidence shows that increased interaction with nonhandicapped students is essential for plaintiff to have role models and to increase his ability to act independently (p.12). (5) Plaintiff is entitled to the following relief: a) His I.E.P. must be changed to focus on acquisition of functional skills and specifically should include instruction in age-appropriate and functional skills in daily living, vocational, and recreational activities and social and community adjustment; it should include instruction in developing appropriate non-verbal communication skills, make provisions for measuring plaintiff's progress in all areas, and cover the entire school year including the summer session. b) Defendants will be ordered to provide suitable in-service training to plaintiff's teacher and special education coordinator. c) Plaintiff's new I.E.P. must provide for significantly increased contact with nonhandicapped students, e.g., by moving his special education class into the main high school building, or, alternatively, by educating nonhandicapped students as well as handicapped students at the Munford Center so that it ceases to be an isolated enclave for the handicapped. Defendants have a heavy burden, whatever option they choose, of insuring that plaintiff's interaction with nonhandicapped students will be

"substantially equal to that he would enjoy were his classroom located in the main school building." d) Because no education can adequately compensate plaintiff for past deprivation, defendants will be ordered to provide plaintiff with a free appropriate education for two years past his 21st birthday. (pp.12-14)
(6) This court will retain jurisdiction of this case. (p.14)
(7) There is support for damage awards against agencies not protected by the Eleventh Amendment under EHA, §504, and §1983. Plaintiff has suffered damage stemming from educational deprivations in his formative years, but it is impossible to determine with any certainty the extent to which his damages predated his family's move to Talladega County in 1973. Because the amount of damages must be capable of some reasonable determination, plaintiff is not entitled to an award of money damages. (p.15) (8) Reasonable attorneys' fees will upon proper application be awarded to plaintiff under §504, 29 U.S.C. §794(a),(b). (p.15).

Capello v. District of Columbia Board of Education, C.A. No. 79-1006 (D.D.C. 5/9/79). 3 EHLR 551:190.

Action by an 18-year-old autistic, mentally retarded and emotionally disturbed student and his parents seeking placement of plaintiff at a residential facility. At the time of this action, plaintiff was attending a day facility for children with special needs. During the summer of 1978, plaintiff's mother requested placement at the Concord School, a residential facility. The Department of Education refused this request alleging that plaintiff's needs could be met at the day facility. Plaintiff's parents then requested and were granted a "denial of change of placement hearing" pursuant to 20 U.S.C. §1415(b)(2) at which the hearing officer found that plaintiff's day facility placement could no longer meet his educational needs adequately. The hearing officer gave the school system forty days to develop a plan to meet plaintiff's educational needs. At the end of this forty day period plaintiff filed this action pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.), §504 of the Rehabilitation Act (29 U.S.C. §794) and Mills v. Board of Education, 348 F.Supp. 866 (D.D.C. 1972) Rulings (in denying plaintiff's motion): (1) Four factors must be considered in granting a preliminary injunction - whether plaintiff has made a strong showing that he is likely to prevail on the merits; whether plaintiff has shown irreparable injury will follow denial of injunctive relief; whether a stay would substantially harm other parties; and whether the public interest favors injunctive relief. (p.551:191) (2) Plaintiff has not demonstrated irreparable injury as he has made considerable progress in his present placement and there is no evidence that his parents are unable to handle him living at home. Furthermore, residential placement is a drastic step which should only be taken for the child's well-being.
(3) Pending the outcome of any review proceedings, the student should remain in the placement in effect when the appeal was filed, 20 U.S.C. §1415(e)(3). (p.551:191) (4) Also, students should be educated in the least restrictive environment, 20 U.S.C. §1412(5)(B).(p.551:191)
(5) As the Court is not clear as to whether a residential or day program is more appropriate, plaintiff's motion is denied. However, defendants are directed to develop a plan which will meet plaintiff's educational needs up to and through his twenty-first year. (p. 551:192) (6) The

federal stipulation which requires the states to educate all handicapped children between ages 4 through 21 by September 1980, "does not preclude the states from providing services to handicapped children over 18 before September 1980; rather it specifies that they must do so by then to be eligible for federal funding, while allowing federal funding prior to 1980 if such children are served before then." Defendants are therefore directed to now develop a plan which will meet plaintiff's needs through his 21st year. (p. 551:192).

In the Matter of Cordero, 177 N.Y.L.J. No. 28, p. 6,
Supreme Ct., Special Term, 2/9/77 (Clearinghouse #20,788A)

Article 78 proceeding seeking a judgment requiring respondents to provide immediately suitable and adequate home instructional service to petitioners, who are severely handicapped public school students unable to receive normal classroom instruction. Rulings (in denying class certification and dismissing petition): (1) Respondents' motion to dismiss petition for failure to exhaust administrative remedies is untenable, for a prior order issued during the pendency of this proceeding held such relief to be unavailable to respondents as a matter of law. (2) Petitioners request that this matter be found a class action is denied; "governmental operations being involved, on the granting of any relief to the petitioners, comparable relief would adequately flow to others similarly situated under principles of stare decisis." Citing Matter of Rivera v. Trimarco, 36 N.Y.2d 747 at 749. (3) The court may not direct respondents to continue to furnish petitioners with the educational services from licensed public school teachers as previously provided. The educational television programs devised to replace the 50 percent curtailment in personal instruction previously provided constitutes an inadequate substitute. Yet, respondents' action does not violate either Section 4402 of the Education Law, or Art. 2, §1 of the N.Y. Constitution, any more than other equally drastic measures taken by respondents under the exigencies of a sharply reduced educational budget. (4) Petitioners' claim of discriminatory treatment is without merit, for the reduction of educational services to home bound students is within respondents' discretionary power and does not affect petitioners disproportionately. (5) The court may not substitute its judgment for that of respondents in this matter which is administrative in scope. Petitioners must seek any available remedy in other than a judicial forum.

Cox v. Brown, C.A. No. 80-2365 (D.D.C. 10/7/80) 3 EHLR 552:220

Action by parents of two learning disabled children alleging that the Department of Defense Dependant Schools (DoDDS) failed to provide an adequate program to meet their child's unique needs. Plaintiffs allege that DoDDS is under 20 U.S.C. §927, mandated to identify and assess their children's individual needs, devise individualized education programs and fund private school placements if DoDDS is unable to provide the necessary services within its own resources. Plaintiffs are seeking an injunction directing the Department of Defense to place and fund the placement of the two children at two specific private schools in the United States. Plaintiffs' children are currently placed at the SHAPE School in Belgium. Plaintiffs allege that the SHAPE School is inadequate to meet the needs of their children due to the lack of physical facilities, trained personnel, and resources necessary to implement the IEPs. Action brought pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794); and the Developmental Disabilities Act of 1978. Defendants allege that 20 U.S.C. §1415(C)(3) is a bar to this action due to plaintiffs' failure to exhaust administrative remedies. Defendants further allege that to place the children in private residential placement violates the concept of mainstreaming. Rulings (in granting motion for a preliminary injunction): (1) "Given its [20 U.S.C. §1415(e)(3)] obvious intent to guarantee due process to children and parents, within the entire statutory scheme, the defendants' representation that §1415(e)(3) precludes judicial action in providing the Cox children with the appropriate education that they deserve at this time simply cannot be accepted." (p.552:222). (2) "Where a State, or a Federal agency,acts to frustrate the purposes of the Act, however well-meaning, that entity should not be permitted to convert the statute into one against judicial intervention favoring children in their education pursuits." (p.552:222). (3) For the Court to grant the extraordinary injunctive relief requested, the plaintiffs must clearly demonstrate (a) that there is a substantial likelihood that they will succeed on the merits of the case; (b) that irreparable harm would occur to the plaintiffs absent such an injunction; (c) that an injunction would not substantially harm the rights of the third party, and (d) that an injunction is in the public interest. (p.552:223) (4) "The Court must weigh the irreparability of harm and, if it is substantial, the Court may, in its discretion, grant relief even though its view of the merits may markedly differ from that of the plaintiffs." (p.552:223). (5) P.L. 94-142 applies in full force to DoDDS pursuant to 20 U.S.C. §927(c)(p.552:223). (6) The fact that DoDDS has a general lack of special public programs, rarely recommends residential educational placements, and has no existing residential schools in the United States, indicates that the plaintiffs have a substantial likelihood of succeeding on the merits. (p.552:223). (7) While mainstreaminng is an essential concept, the affidavit of an expert knowing these children quite well indicates that they "require placement at private residential, educational facilities, albeit far from their parents home, and that past experience advises against mainstreaming." (p.552:223). (8) Placement at private facilities, even if for only the period of time pending a final decision on this matter, would provide the children with an improved educational environment over their existing circumstances. (p.552:223) (9) "The extent of the irreparable harm in this unique case is sufficient to permit rejection of defendants' argument that plaintiffs have failed to exhaust their administrative remedies." (p.552:224) (10) Congressional intent is that DoDDS must provide an appropriate educational program for each of its pupils. (p.552:224) (11) "Unless reasonable appropriate alternatives are available the rights cannot be restricted by monetary limitations." (p.552:224) (12) Where irreparable harm may ensure, exhaustion of administrative remedies is not required; further, no administrative review mechanism was in place here.

Cox v. Fouts, No. 13288, Findings of Fact and Conclusions of Law and Judgment Thereon 11/17/80, Petition for Writ of Mandate §1085; and for Declaratory and Injunctive Relief and Damages 8/24/79, Answer to Petition for Writ of Mandate, Declaratory and Injunctive Relief and Damages, 10/12/79, Petitioner's Memorandum of Points and Authorities in Support of Petition for Writ of Mandate 8/24/79, Supplemental Memorandum of Points and Authorities, 10/30/79, Petitioner's Reply Brief 11/7/79. (Superior Ct., San Diego Cty., Calif.) Clearinghouse #28,436.

Action by parents of a handicapped child for school district's failure to provide their child with a hearing to resolve a complaint concerning the appropriateness of their child's special education program, including the fact that the child was scheduled to graduate in June 1979. Petitioners contend that their child did not achieve any of the goals of the I.E.P. and was not qualified to graduate. For this reason they sought a due process hearing. However, although petitioners never withdrew the request for a hearing, respondents cancelled the one they had scheduled due to the child's pending graduation. Petitioners bring this action pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.) Rulings (in favor of petitioners): (1) Respondents are required, pursuant to P.L. 94-142, to continue the child's special education placement at no cost to him or his parents, during the pendency of the complaint and hearing (p. 4) (2) The child's graduation constituted a change of placement during the pendency of petitioner's complaint. (p. 4) (3) "State and federal special education laws prohibited respondents from graduating Cox [the child] or otherwise changing Cox's placement during the pendency of Cox's complaint." (p.4) (4) Cox's graduation is inappropriate until the complaint is resolved. (p.5) (5) Respondents are ordered to convene a fair hearing to consider Cox's complaint. (p. 5)

DeNunzio v. Board of Education of the City School District of the City of New York, 396 N.Y.S.236
(Supreme Ct., App.Div., 1st Dept., N.Y. 1977)

Action under state law challenging budgetary cuts in educational services for handicapped children which resulted in depriving parents and their children of the right to have their cases considered by a competent committee of professionals, the right to be afforded an opportunity to appear before the committee, the right to an impartial hearing in the disagreement with the committee's recommendation and the right to be maintained in an educational program pending the outcome of the hearing. Rulings: (1) The school programs designed for handicapped children during the academic year were not in compliance with the procedural safeguards provided by law. (p.237) (2) Because educational policy is entrusted by statute and the constitution to school administrators, the court defers to their expertise in the decision to use media instruction, rather than the personalized instruction previously used, in the homebound instruction program since there is no proof the decision was arbitrary or capricious. (p.237) (3) "While it would appear that the cuts in programs under attack are more drastic than those implemented in schools for normal students, a claim of denial of equal protection of law cannot rest merely on the percentage of budgetary cuts in the said program" (p.237) (4) The case is now moot. (p.237)

Department of Education, "Notice of Interpretation: Individualized Education Programs," 46 Fed.Reg. 5460-5475 (January 19, 1981).

The U.S. Department of Education has issued a notice of interpretation concerning the purpose, content and development of individualized education programs (IEPs) for handicapped children.

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The notice clarifies that the state education agency is ultimately responsible for ensuring that each agency in the state is in compliance with the IEP requirements and that local educational agencies are responsible for developing the IEP for each handicapped child even if the child is to be placed in a state operated or out-of-state institution. The notice clarifies the parent's role in the IEP development process in defining parents as "equal participants" and specifically their right to be notified as to who will be at an IEP meeting; the notice also addresses the issue of what other participants should be included in the development of the IEP. Finally, the notice clarifies the intended focus and content of the IEP. It emphasizes that the IEP must include all services needed by the child and not simply those available from the public agency.

Note: Advocates should be familiar with this notice of interpretation since it specifically addresses many questions and concerns which have arisen in the representation of handicapped children. The Reagan Administration, however, has this policy interpretation under review. See 46 Fed.Reg. 19001 (March 27, 1981) and has postponed the interpretation. See 46 Fed.Reg. 25614 (May 8, 1981).

Doe v. Grile, Civil No. F-77-108 (N.D.Ind., Fort Wayne Div., Consent Agreement 9/12/79) 3 EHLR 551:285

Action on behalf of severely and profoundly retarded children who alleged their school district failed to afford them a sufficiently low student-teacher ratio, that teacher aides were not properly trained for their duties, and that appropriate treatment and services were not being offered. Class certification was denied (Order, 8/9/78). The court also ruled that the Indiana Protection and Advocacy Service for the Developmentally Disabled did not have the authority to represent two of the students, whose parents were either unable or unwilling to concern themselves with their childrens' needs. (Order, 8/9/78); Reaffirmed in Order, 1/31/79, 3 EHLR 551:151). Provisions (in Stipulation of Agreement for Dismissal): (1) School district will hire a new coordinator for programs for the severely and profoundly retarded who will plan and execute programs for such students. (2) School district will hire additional staff or contract with outside consultants or agencies to structure and adopt its existing program for the severely and profoundly retarded in accordance with sound educational policy and applicable legal requirements. (3) An existing Citizens Advisory Committee for Special Education will advise the district on meeting certain terms of the consent decree. (4) A student-teacher and student-aide ratio is set, subject to "changes in circumstance" or the law relating to special education. (5) The district will attempt to coordinate its activities with those of other governmental and community agencies serving the severely and profoundly retarded. (6) A more formal pre-service and in-service training program for teachers and aides working with the severely and profoundly retarded will be developed. (7) The district will integrate vocational and pre-vocational training activities into its curriculum for the severely and profoundly retarded.

(8) Two full-time speech therapists will be added to work with the severely and profoundly retarded. (9) The district will add a comprehensive motoric assessment and screening device to identify students in need of specific physical or occupational therapy. (10) The State Department of Public Instruction, in conjunction with the local district defendants, will develop and implement a model information and record-keeping procedure for use in programs for the severely and profoundly retarded. (11) The State Department will review the local district's compliance with the consent agreement as part of the state's regular monitoring and review. (12) The agreement will not be filed with the court.

"Enforcing the Right to an Appropriate Education, The Education for All Handicapped Children Act of 1975," 92 Harvard Law Review, 1103 (March, 1979)

This article provides an overview of the statutory protections afforded by P.L. 94-142, 20 U.S.C. §§1401 et seq.; the practical difficulties inherent in full implementation of the statute; the procedural approach to enforcement of the educational rights of the handicapped; and the scope of the substantive rights under the statute, especially the issues involved in the guarantees of the right to education in the least restrictive environment and to appropriate education.

Fitz v. Intermediate Unit #29, 403 A.2d 138 (Commonwealth Ct. of Pa. 1979).

Action by parents of a 17 year-old hearing impaired child seeking tuition reimbursement pursuant to Section 1376 of the Public School code of 1949, 24 P.S. §13-1376 for their placement of child at the Pennsylvania School for the Deaf (PSD). Prior to this placement Peter (plaintiff's child) was enrolled in the special education classes of Intermediate Unit #29. Plaintiffs placed Peter at PSD due to dissatisfaction with the program at the Intermediate Unit (I.U.) Plaintiffs allege that the I.U.'s failure to provide "total communication" instruction and vocational program for their child made the program inadequate. However, at an administrative hearing, defendants indicated that the I.U. was capable of developing a vocational program. The hearing examiner recommended Peter stay in the I.U. program. After the Secretary of Education's adoption of this recommendation, plaintiffs brought this appeal. Rulings (in affirming the Secretary's determination): (1) Petitioners have failed to present evidence that a vocational program is preferable to an academic program, or to prove the insufficiency of the I.U.'s proposed vocational program. (2) "[P]etitioners' withdrawal of Peter from the I.U. and subsequent enrollment at PSD, before they had made known their desire for vocational training for Peter, effectively limited the District's or I.U.'s ability to prepare an appropriate vocational program for Peter." (p. 141) (3) The court rejects petitioner's contention that the Secretary of Education erred in making a finding on the adequacy of the I.U. program rather than remanding to allow the hearing officer to make a finding on the issue. "Absent a requirement that the [Secretary] is bound by the decision of the hearing examiner, the [Secretary] is free to make his own determination and findings subject to review by this Court." (p. 141).

Frederick L. v. Thomas, No. 74-52, Third Stipulation of Parties (E.D.Pa. April 7, 1980)(See Bulletin, pp. 193, 273, 536)

Motion for contempt filed against the defendant Philadelphia School District for violation of a 1976 order requiring identification and placement of specific learning disabled children residing in the school district. In this stipulation of the parties in partial settlement of the motion for contempt the Philadelphia School District is required to: (1) "Provide each LD student with access to the full range of programs of career awareness, career exploration, and vocational education and training at the same age at which these programs are provided to non-handicapped students within the School District." (p.4) (2) Each student's I.E.P. team will consider that student's career and vocational needs and abilities. (p. 5) (3) "To the extent that a LD student cannot, with appropriate assistance, meet the requirements of a particular program, he/she shall be provided with an opportunity to acquire related skills or alternative skills within the particular program or in some alternative program." (p. 5) (4) LD students should be provided with supportive services such as vocational and academic resource programs and paraprofessional support in order that they may participate fully in their career and vocational educational programs. (p. 6) (5) Defendants shall submit a plan to the court and to counsel for plaintiffs which assures the establishment of access to career and vocational programs. (pp. 6-8) (6) "The school district shall submit to the court and to counsel for plaintiffs a written plan which shall provide for the recruitment, hiring and training of additional personnel, including vocational teachers, paraprofessional aides, special education teachers and evaluators necessary to provide full access to meaningful career and vocational education for all LD students. . ." (p.8) (7) Each child's I.E.P. will provide for all the related services necessary to assure the student an appropriate education. (p.9) (8) Defendants must employ a sufficient number of bilingual personnel in order that non-English speaking students receive an appropriate educational program. (p.11) (9) The school district shall provide inservice training for newly hired personnel. (p.12) (10) For two years, the district shall submit quarterly reports to the court and plaintiffs' counsel on compliance with the agreement. (p. 13)

Howard S. v. Friendswood Independent School District, 454 F.Supp. 634 (S.D. Tex. 1978)

Action for preliminary injunctive relief on behalf of high school student who suffers from a specific learning disability due to brain damage and an emotional disability. Plaintiff was successfully enrolled in a junior high school program run by defendant school district where he was mainstreamed in the regular educational program and received help from a resource teacher who dealt with his special needs. However, when plaintiff was promoted to defendants' high school, he exhibited behavioral difficulties which the school treated as disciplinary, rather than special education problems. In fact, the special education department was not notified of these problems. Plaintiff eventually made a suicide attempt, and was placed in a private school by his parents, following his being "officially dropped" by the school district. Plaintiff alleged that he was denied a free, appropriate public education from the time he entered high school in violation of §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and the Fifth and Fourteenth Amendments.

Rulings (in granting preliminary injunctive relief): (1) Defendants have failed to provide plaintiff with a free, appropriate public education and "this failure was a contributing and a proximate cause (although certainly not the sole or even the predominate cause) of [plaintiff's] severe emotional difficulties which culminated in his suicide attempt and confinement [in a hospital for the emotionally disturbed]." (636, 640) (2) When the school district "officially dropped" plaintiff without notice while he was confined in the hospital, it constituted an "effective and constructive expulsion" without a hearing and was a clear violation of plaintiffs' constitutional rights. Citing Goss v. Lopez, 95 S. Ct. 729 (1974). (636) (3) When a school district special education committee "dismissed" plaintiff from his educational program while he was hospitalized, on the pretext that he had moved, the district clearly violated its constitutional obligations. Citing Goss. (636) (4) The district intentionally evaded and avoided its obligation, under §504 and the Constitution, to provide plaintiff with an adequate due process hearing concerning his educational needs. (636-37) (5) The meeting convened by the district did not meet the requirements of §504, substantive or procedural due process protections, or §615 of P.L. 94-142 [20 U.S.C. §1415, although it was not fully operative at the time]. (636, 638) (6) Plaintiff "took virtually all action which could have been taken to attempt to obtain administrative relief" and any steps taken would have been futile since no adequate mechanisms existed to provide an effective administrative remedy. (638) (7) The school district "has received extremely poor advice concerning its legal obligations and the possible liability of individual administrators and Trustees for intentional violation of plaintiffs' constitutional rights. In this connection, the attention of the Board of Trustees is respectfully directed to the possibility of personal liability being imposed upon school board members for failure to comply with their legal obligations." Citing Wood v. Strickland, 95 S. Ct. 992. (638) (8) Plaintiff is a handicapped child under the relevant federal statutory definitions and has been discriminated against. (639) (9) Defendant school district, by failing to provide plaintiff with a free, appropriate public education and an individualized educational program, has discriminated against plaintiff.

(639) (10) Defendant state department of education has not established adequate administrative remedies or procedural due process protections for the handicapped. (640) (11) Although there may be requirements in Texas statutes that binding action of certain types be undertaken only by local school boards, local boards do not have unfettered discretion and can be required to adopt due process mechanisms which comport with federal requirements. (640) (12) The regulations issued by the Secretary of Health, Education, and Welfare under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and P.L. 94-142 and P.L. 93-380 (20 U.S.C. §§1401 et seq.) are "reasonably related to the purposes of the enabling legislation." (640) (13) "42 U.S.C. §1983 and the Rehabilitation Act of 1973 (29 U.S.C. §794) do afford the plaintiffs a private cause of action." (640) (14) "The certainty of harm to plaintiffs outweighs the inconvenience and the expense to the defendants occassioned by the granting of injunctive relief." (642) (15) Defendant local school officials must forthwith conduct an immediate comprehensive evaluation of plaintiff in consultation with his parents and, following the evaluation, must immediately develop and implement an individualized educational program for plaintiff. (642) (16) Local defendants shall pay all costs of plaintiffs' private educational placement from the date of his constructive exclusion until provision of an appropriate program by defendants or the conclusion of appropriate impartial due process review. (642) (17) Local defendants shall take all action necessary and appropriate to insure plaintiff will not be denied treatment and education in his present private school placement. (642) (18) Plaintiffs are required to post a minimal security bond of $500 for payment of any costs or damages incurred by any party later found to have been wrongfully enjoined. (643)

Note: This is an excellent decision which provides guidelines for the types of relief which should be sought in cases involving disciplinary exclusion of children in need of special education and other special education exclusions.

Kent v. Amarillo Independent School District, C.A. No.
280-56, 3/25/80, Memoranda in Support of Temporary
Restraining Order and Preliminary Injunction (N.D.Tx.)
(Clearinghouse #30,744)

Action by a 9 year old autistic and mentally retarded child with profound hearing impairment against defendant school district for its failure to provide plaintiff with 24 hour residential placement, thereby denying him his right to a free appropriate public education. Defendants allege that they have no money for contract placements and can therefore not contract to place plaintiff in the appropriate residential placement. Plaintiff alleges that defendants have failed to provide plaintiff with an adequate educational evaluation. Plaintiff also alleged failure to provide appropriate transportation to and from school as plaintiff was consistently delivered 1 1/2 to 3 hours late. Plaintiff appealed through the administrative process,the result of which indicated that the defendant must select an appropriate institution or school which is capable of meeting plaintiff's full time residential needs. Defendants refused to look for an appropriate placement unless plaintiff signed an application requesting admission to a state school for the mentally retarded. Defendants acknowledge that this application process could take 6 months or longer and that the state school would not provide educational services. Plaintiff therefore brought this action pursuant to Section 504 of the Rehabilitation Act of 1973, P.L. 94-142 (20 U.S.C. §§1401 et seq.) 42 U.S.C. §§1983 and 1988 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiff contends defendants' failure to provide notice to plaintiff of his right to comprehensive individual assessment, refusal to perform a comprehensive evaluation of plaintiff, failure to provide plaintiff an educational program designed to meet his unique needs as adequately as the needs of non-handicapped students are met, and failure to provide appropriate transportation for plaintiff. Plaintiff seeks injunctive relief as well as $150,000 in compensatory and punitive damages and appropriate compensatory educational services for four years after plaintiff reaches age 22.

Krawitz v. Commonwealth Department of Education, 408 A.2d 1202 (Commonwealth Ct., Pa., 1979)

Appeal by parents of a mildly learning disabled and mildly emotionally disturbed child, of a decision of the Secretary of Education adopting a hearing examiner's recommendation that their child be enrolled during the school year 1977-78 in an educational program in the school district's intermediate unit rather than in a private residential school in Massachusetts. Plaintiffs' child had been placed in a private residential school in Pennsylvania for the seventh and eighth grades. When she outgrew that placement the school district recommended she continue in private placement and provided her parents with a list of approved private schools in Pennsylvania. The parents rejected this recommendation and placed their daughter in the Massachusetts school and sought state tuition reimbursement. The parents requested, but were denied a hearing, due to failure to follow the correct complaint procedures, i.e. failing to execute a hearing request form. Believing no suitable programs existed in Pennsylvania, they enrolled their daughter in a private school in Massachusetts at their own expense. Fourteen months later, a hearing was held at which the hearing officer concluded that she was not eligible for out-of-state placement since Department regulations provided for such placement only for severely multihandicapped persons. The hearing officer recommended placement in the Intermediate Unit; the Secretary of Education adopted this recommendation. Plaintiffs now appeal pursuant to 24 P.S. 13-1376 (Pennsylvania Special Education Law). Rulings: (1) Since appellants might have accepted placement at a Pennsylvania private school had they been originally granted a timely due process hearing, failure to provide a timely hearing was not without consequence. Therefore, appellants should be reimbursed for tuition paid for the 1976-77 placement in Massachusetts. (p.1204) (2) Pursuant to 22 Pa.Code. §13.11 it is the responsibility of the school district and the intermediate unit to provide special education programs. Only if these agencies cannot provide an "effective and efficient education to handicapped students, may residential schools in an out-of-state placement be used." (p.1205) (3) Pennsylvania law does not require the approval of a "more appropriate" program when an appropriate program exists in the intermediate unit. (p.1205) (4) The Secretary of Education's order placing the student in the intermediate unit rather than residential placement is affirmed. (p.1205).

Kruse v. Campbell, 431 F.Supp. 180 (E.D.Va., 1977)
vacated and remanded, 98 S.Ct.38 (1977)

Class action for declaratory and injunctive relief challenging (a) Virginia's statutory tuition reimbursement scheme, which provides up to 75% of the cost for private education of handicapped children, and (b) the practices of state welfare officials who would pay the full cost of private special education if the parents would agree to relinquish custody of their children. The impact of the scheme is that poor parents cannot take advantage of the funding because they are unable to pay the balance, while wealthy parents can. Action is brought under the First, Ninth, and Fourteenth Amendments, the Rehabilitation Act of 1973, 20 U.S.C. 794, and the Social Security Act, 42 U.S.C. 601 et seq. Rulings (in favor of plaintiffs): (1) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, establishes the present right of handicapped children to an education. That right is in no way diminished or impaired by P.L. 94-142, the Education for All Handicapped Children Act of 1975, which reenforces the present right to special education, and provides a funding mechanism, even though that funding mechanism is not yet in full operation. However, there is no reason for the court to attempt to provide a more comprehensive approach to the delivery of special education services than is required by federal statute. (pp. 5-6) The case should be decided on constitutional grounds. (p. 7) (2) This case falls within the circumstances described by the Supreme Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), where the Court indicated that the absolute denial of public education would probably not be constitutionally acceptable. (p. 8) (3) This "discriminatory exclusion from educational opportunity is violative of equal protection because it is irrational and fails to further any legitimate state interest." (p. 8) (4) The state statute "is violative of the equal protection guarantees under the Fourteenth Amendment by virtue of its exclusion from a publicly supported and appropriate education of the plaintiff class of poor handicapped children, while providing the same for those handicapped children whose parents are affluent enough to take advantage of the tuition grants." (p. 10) (5) The practice of placing children in the custody of state welfare agencies so that full tuition can be paid is a violation of the fundamental right to family integrity. (pp. 10-11) (6) The court enters declaratory and injunctive relief including provisions for providing an appropriate education for the plaintiff class, requiring the defendants to submit a remedial plan, and requiring actions to return children to the custody of their parents unless this is demonstrated to be inappropriate. (Decree and Order)

Laura M. v. Special School District No. 1,
#4-79-123, Order (D.Minn. 1/21/80)

Action by 16 year-old child with a specific learning disability and social and emotional problems seeking declaratory and injunctive relief against defendants for failure to provide a free appropriate public education in the least restrictive environment. Plaintiff also seeks reimbursement for private educational placement by parents on the grounds that the program proposed by school district was inappropriate. Action brought pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794); the Fourteenth Amendment; 42 U.S.C. §1983; and Minnesota Statutes §120.17. Plaintiff further alleges that defendants, Commissioner of Education and Assistant Commissioner for Special and Compensatory Education rejected the Hearing Examiner's conclusion that the school district was liable for tuition expenses incurred by the parents in providing an appropriate education for plaintiff and that such rejection of the Hearing Examiner's recommendations was inconsistent with federal and state law. Plaintiff finally alleges that the proposed I.E.P. developed by defendant school district is not adequate to meet her needs as it failed to provide her with an education in the least restrictive environment and to specify the modifications which should have been made in plaintiff's "mainstream" classes. Rulings (in granting in part and denying in part plaintiffs' motion for summary judgment): (1) "The nature and extent of Laura M's handicap is such that she should be in a regular education program with the direct service assistance from special educational personnel as provided in the I.E.P. proposed by defendants."(p.6) (2) Defendants should not be required to reimburse plaintiff's parents for her private school placement. (p.7) (3) In making a decision on the relief to be granted a court must base its decision on a preponderance of the evidence. This, however, does not require any special deference to the decision of an administrative agency and Congress intended no such deference. (p. 8) (4) Plaintiff's I.E.P. is inadequate in that it fails to provide her with the immediate help and feedback needed or with a nuturing situation or a situation which would encourage success. Therefore, any future I.E.P. will provide that: classroom and special education teachers review plaintiff's courses to determine any accommodations which must be made because of plaintiff's handicap; monitoring services be available at all times; special education teachers provide plaintiff with examinations for her regular classes that are modified so as to permit accurate measurement of her progress; weekly reviews be made to determine the modifications which are necessary to plaintiff's educational program. (pp. 10-11) (5) As this relief is appropriate defendants are not required to implement the relief provided for in the hearing examiner's report. (6) The hearing officer's decision to order defendant to reimburse plaintiff's parents for the cost of her private school education is inappropriate as defendant's proposed I.E.P. was a reasonable attempt to meet plaintiff's unique needs and plaintiff's parents were involved in the process of deciding what the I.E.P. should contain. While plaintiff's parents had a right to withdraw her from the public school system because they were not pleased with her educational program, they cannot expect defendant to reimburse them. (pp. 11-12).

Lopez v. Salida School District No. R-32, C.A. No. C-73078, Dist. Ct., Cty. of Denver, Colo., Complaint, 7/14/77, Consent Decree, 1/20/78 (Clearinghouse #s 22,274A, C)

Action seeking declaratory relief, damages and compensatory education brought by 20-year-old plaintiff, identified as a handicapped pupil, who has been excluded from school for a period of three years, except for a brief period of instruction at home. Plaintiff claimed that he was denied his right to a free public education, Colo. Const. art. IX, §2, C.R.S. 1973 §22-33-101 et seq.; and his right to an appropriate educational program designed to meet his special emotional needs, Colo. Handicapped Children's Educational Act (1973), C.R.S. 22-20-101, et seq. Moreover, plaintiff asserted that his exclusion violated Section 504 of the Rehabilitation Act of 1973, 20 U.S.C. §794, its regulations, and 42 U.S.C. §1983, as well as his rights to equal protection and due process of law under the Fourteenth Amendment and Colo. Const., art. II, §2 and §25. Prior to the hearing on plaintiff's motion for a preliminary injunction, defendant school district approved a plan of education for plaintiff and implemented an educational program designed to meet his special educational needs. A consent order provides: (1) The district shall continue to provide the program of education developed for plaintiff's needs and in which he has been enrolled since September 1977. (2) Plaintiff will also be provided with tutorial, psychological, and counseling services provided by the school district and coordinated and supervised by the local board of cooperative services which is responsible for furnishing special educational services. (3) The program shall continue from September to June through the academic years, 1977-78, 1978-79, even though plaintiff will be 21 years old in April 1978. (4) Defendant district will pay the costs of said program including room and board, but will not be required to furnish transportation. (5) All claims against the defendants for monetary damages are dismissed with prejudice and all other claims are dismissed, but the court may enforce all terms set forth in the decree. (6) A staffing or evaluation shall be furnished to determine plaintiff's special needs and shall be conducted by certain designated persons, including a psychologist. If it is determined after a staffing that the program provided plaintiff is inappropriate to meet his special educational needs, an alternative program shall be provided and paid for by the defendant school district. (7) The obligation of defendant school district will terminate prior to June 1979, only if plaintiff voluntarily fails or refuses to pursue his educational program without just cause. (8) The court retains jurisdiction of this action, and defendants, the school district and the local board of cooperative services, must provide plaintiff's attorneys with periodic progress reports twice each academic school year.

M.R. v. Milwaukee Public Schools, 495 F.Supp. 864
(E.D.Wis., 1980)

Class action, on behalf of 150-200 handicapped children who were placed in day treatment facilities, seeking to enjoin defendants from terminating their current placement until the completion of a full and impartial evaluation of their educational needs. Defendants had informed plaintiffs that day treatment services would be terminated and that placements would not be continued during the period of an appeal. Plaintiffs' motion for a preliminary injunction consists of five separate requests: they seek to enjoin defendants from terminating their current placements pending completion of a full evaluation; enjoin defendants from delaying, biasing, or interfering with the forced impartial evaluation of the plaintiffs' educational needs and handicapping conditions; to complete the evaluation process within 30 days and issue an effective placement order within 15 days of completion of the evaluation; to enjoin defendants from terminating the placements of those children in extended school year programs; to require defendants to develop a continuum of services for plaintiffs and their class to avoid the necessity in the future of placing plaintiffs in residential treatment centers or other highly restrictive settings. Plaintiffs bring this action pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Due Process and Equal Protection Clauses 42 U.S.C. §1983, Article X, Section III of the Wisconsin Constitution, and Chapter 115 Wis.Stat. They seek declaratory injunctive and monetary relief. Rulings (in granting a limited preliminary injunction): (1) "The plaintiffs' claim for damages against the state superintendent of public instruction in her official capacity is essentially a claim against state funds. In the circumstances of this case, however, a congressional authorization exists to abrogate the state's eleventh amendment immunity from retroactive monetary claims payable from the state treasury. Therefore, insofar as the complaint seeks to impose a liability which must be paid from public funds in the state treasury, it must be dismissed because the court lacks jurisdiction over such claims by reason of the eleventh amendment." (p.867). (2) The Eleventh Amendment, however, does not bar the issuance of prospective injunctive relief even though such relief will have an "ancillary effect on the state treasury." (p.867) (3) The eleventh does not bar the recovery of damages from the state superintendent of public instruction in her individual capacity. (p.367). (4) Since the department of public instruction lacks the capacity to be sued under state law it must be discussed as a party from the suit. The relief which might have been obtained against the department may be obtained against the state superintendent in her official capacity. (p.867). (5) Plaintiffs have a right to injunctive relief enjoining defendants from terminating the plaintiffs' current placements until the completion of a full and impartial evaluation of their educational needs and handicapping conditions; throughout that period the parents of plaintiffs may request a hearing on the evaluation and placement offers until the completion of the administrative and judicial review of those hearings. (p.869) (6) State law also mandates a "no action" policy pending appeal. (p.869) (7) Even though the full cost of enrollment in the day treatment center was borne by the Milwaukee County Department of Social Services, the placement is still an educational placement and the state educational authorities have responsibility for continuing the plaintiffs' placements in the day treatment centers. (pp.869-70) (8) The defendants' threatened action will cause plaintiffs irreparable harm if not enjoined. Furthermore, the plaintiffs have no adequate remedy at law. (p.870). (9) The action is certified as a class action but only as to the claims for declaratory and injunctive relief. (p.870) (10) Plaintiffs' requests to enjoin defendants from delay and bias in the evaluation process, to require defendants to offer extended school year programs, and to develop a continuum of services are surrounded by too many factual disputes and contradictions to permit the court to make the necessary findings which would warrant the issuance of an injunction at this point. (p.868)

Martin, Edwin, Chief, Bureau of Education for the Handicapped,
USOE, Letter to Chief State School Officers, 11/77

This letter is designed to resolve an issue which arose because of differences in the wording of the proposed and final regulations to implement the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq. The issue is whether a student's individualized education plan (IEP) must contain a statement of all services needed by the pupil, or only those needed and available in the system. The proposed regulations explicitly stated that IEP's must list all services needed, without regard to availability. This language was deleted from the final regulations, but without substantive effect according to the....

Mason v. Witney, C.A. No. 80-88, D.Ct. Complaint (3/27/80); Memorandum in Support of Motion for Class Certification, (8/1/80); Intervenor's Complaint (5/6/80); Order (9/17/80) (Clearinghouse #30,281)

Class action on behalf of those children who presently or will in the future reside at Vermont State Hospital and who are or will in the future be handicapped within the meaning of P.L. 94-142 (20 U.S.C. §§1401 et seq.). Named plaintiff alleges that defendants wrongfully placed him in programs and facilities that serve only handicapped children which deprives him of his statutory right to an education in the least restrictive environment. Plaintiff is also in need of speech therapy but has been denied such therapy and therefore alleges denial of his right to special education and related services. While the named plaintiff has an IEP, his natural parents have never signed the IEP nor participated in the development of the IEP. Plaintiff also alleges that he has never been formally evaluated to determine the extent to which he could be educated in a regular classroom. As to the class as a whole it is alleged that: surrogate parents have not been appointed for those members of the proposed class who are eligible; IEPs have never been developed or implemented for some members of the class; those children on locked wards are receiving no special education; defendants have failed to initiate special education and related services for some members of the class within a reasonable period of time after their admission to the Vermont State Hospital; and evaluations have not been provided for some children prior to initial placement in a special education program. Plaintiffs bring this action pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.) and the Equal Protection Clause of the Fourteenth Amendment, seeking declaratory and injunctive relief. Rulings (in granting class certification): The class of those children between the ages 6 through 21 who presently or will in the future reside at the Vermont State Hospital and who or will be handicapped within the meaning of P.L. 94-142 is certified.

Matthews v. Campbell, C.A. #78-0879-R (E.D.Va. 7/16/79) 3 EHLR 551:264

Action by severely/profoundly retarded child suing by his mother under 94-142 (20 U.S.C. §§1401 et seq.) for injunctive relief ordering defendants to provide full tuition assistance for a residential placement. Despite their good faith efforts, defendants were unable to educate plaintiff in the school environment. In January, 1979, the court had entered a bench order requiring defendants to take steps to provide an education. Defendants appointed an advisory panel to prepare an individualized education program and monitor progress. Plaintiffs allege noncompliance and denial of appropriate education. Rulings: (1) "The statutory framework is clear to the extent that the state must either provide an appropriate education within the public school context or provide full tuition assistance for a residential placement." (p.551:266) (2) As a regular classroom approach has proven inappropriate, residential placement must be ordered even though there are questions about the sufficiency of such programs. (p. 551:266) (3) Defendants must within 30 days place plaintiff in a residential placement. (p. 551:266) (4) The placement must be made with the consent of plaintiff's parents. (p. 551:266) (5) The residential placement is to be at least six months long at the end of which an advisory panel will submit a report to the Court evaluating plaintiff's progress. (p. 551:266) (6) "The Court is especially concerned about what options, if any, it will have should it become apparent that a residential placement is not the appropriate setting for the plaintiff. Neither the language of the Act nor the legislative history appears to contemplate the possibility that certain children may simply be untrainable." [the court indicates it regards plaintiff as untrainable]. (p. 551:266) (7) "A reading of the legislative history suggests that Congress was primarily concerned with handicapped children who, despite their limitations, are capable in some ways of learning and even of being creative and productive." (p. 551:266) (8) That there may be some latitude in equitable relief based upon a common sense reading of §504, as evidenced by the Supreme Court in Davis v. Southeastern Community College, 99 S.Ct. 2361 (1979), indicates that there may be a need to address other options if residential placement doesn't work. (p. 551:226).

McClung, Merle Steven and Pullin, Diana,
"Competency Testing and Handicapped Pupils,"
Clearinghouse Review, March, 1978, pp. 922-27

"This article discusses some issues concerning the fairness and legality of competency testing programs for the handicapped by raising questions about (1) exemptions for handicapped students, (2) individual determinations, (3) differential diplomas and standards, and (4) differential assessment procedures. The article reflects some preliminary thoughts about these questions, and is offered as the beginning of a dialogue, since other questions and issues of equal or greater importance may emerge after further discussion and deliberation." (922)

Mills v. Board of Education of the District of Columbia,
C.A. No. 1939-71, Memorandum Order 6/17/80

Plaintiffs allege that defendants have failed to comply with the orders in Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972) and therefore bring this motion for contempt and enforcement of the decree. Specifically,plaintiffs allege that defendants have failed to provide an appropriate public school placement or alternative residential placement for a substantial number of children in the plaintiff class and that defendants have failed to provide children with a safe environment in several public schools and in institutions operated by the Department of Human Services. Defendants contend that the motion should be denied due to the enactment of the Rehabilitation Act of 1973 (29 U.S.C. §794), P.L. 94-142 (20 U.S.C. §§1401 et seq.) which provide plaintiffs with adequate remedies. Defendants further contend that the contempt motion is premature as plaintiffs have failed to exhaust their administrative remedies and that plaintiffs have failed to demonstrate a "willful and deliberate" violation of the Mills decree. Rulings (in granting plaintiff's motion for contempt): (1) Defendants have acted in contempt as they "had and still have an affirmative duty to follow the prior orders of the Court until modified, that the defendants have in fact failed to follow and abide by those prior orders, and that their actions, in part, resulted from a willful and deliberate violation of those orders." (p.2) (2) Defendants' contention that the plaintiffs failed to exhaust their administrative hearings is without merit as "in too many cases, resort to administrative proceedings has proved to be a futile gesture, resulting in appeals to this Court in which the plaintiffs contend and the Court concludes, that defendants have failed to comply with the applicable law." (p.4) (3) The court rejects the defendants' contention that residential placement was not included within the terms of the *Mills* decree. "Such placements are contemplated by the *Mills* decree where the Court stated that the defendants had a duty to provide an appropriate publicly supported education 'regardless of the degree of the child's mental, physical, or emotional disability or impairment.'" (348 F.Supp. at 878) (p.6) (4) In preventing residential placement by allowing the Department of Human Resources (DHR) to assist in placement only after the child has become a ward of DHR, defendants have violated the *Mills* decree. (p.7) (5) DHR (now Department of Human Services) has failed to establish procedures for administrative hearings for children in need of special education who have been committed to the agency and thereby have effectively denied these children an adequate publicly supported education which meets their unique needs. (p.7) "[T]he Court finds that the actions of the defendants were willful and deliberate in that they knew and understood their obligations to this Court and to the plaintiffs and, without coming back to the Court and seeking a modification of the Court's prior orders, merely chose to ignore those orders and proceed on their own initiative." (p.8)

Mills v. *Board of Education of the District of Columbia*, C.A. No. 1939-71, D.D.C., Order, 8/5/77 (Clearinghouse #71411)

Ruling on plan for education of handicapped pupils in the District of Columbia. "The Court finds the Plan proposed by the Defendants is incomplete, vague, and lacking in specificity and fails to address all of the problems and embody all of the recommendations of the Special Master...." The *court's order* provides in part: (1) acceptance of the plan only as a statement of policy; (2) submission of a detailed plan on or before October 15, 1977, covering identification, testing and placement of pupils; notice to parents of program options, placements and changes in placements; hearing procedures; personnel and staff development; time schedules; and budgetary considerations; (3) that the special master appointed in July 1975 shall continue to assist defendants in implementation activities.

National Center for Law and the Handicapped, "Special Report: A Free, Appropriate Public Education," 2 *Amicus* 22-48 (April, 1977)

This special issue contains a series of articles on the Education for All Handicapped Children Act, P.L. 94-142, 20 U.S.C. 1401 *et seq*. The provisions of the statute are described. An article by Tom O'Donnell describes the legal precedents upon which the act was drawn, primarily federal case law and state law and litigation. Frederick Weintraub describes the section of the law which requires the development of an individualized education program (IEP) for each child and explains how the IEP should be designed and how it should work. Ernie Beal provides a question-and-answer guide for parents dealing with P.L. 94-142,

§504 of the Rehabilitation Act of 1973, 29 U.S.C. 709, and federal student records legislation, 20 U.S.C. 1232g. Jean Postlewaite provides a description of a Mississippi case which seeks to remedy the denial of equal education to children requiring special education, Mattie T. v. Holladay See Bulletin pp. 152, 338) A concise description of the funding formulas under P.L. 94-142 is also included.

Panitch v. Wisconsin, 444 F.Supp. 320
(E.D.Wisc., 1977)

Class action on behalf of children in need of special education seeking declaratory relief that state statutes and state and local policies and practices deny plaintiffs a free public education in violation of the equal protection clause and an injunctive order that defendants provide handicapped children with educational programs sufficient to meet their needs. Action was commenced in 1972 but proceedings were stayed a year later when a new state statute, W.S.A. 115,76 et seq., was enacted which, on its face, satisfied plaintiffs' constitutional demands. Plaintiffs' motion to vacate the stay was granted in 1973 when it became apparent that defendants had delayed inordinately in implementing the new state law. Rulings (in granting summary judgment and injunctive relief): (1) The equal protection clause is violated when handicapped children are denied free public special education. (322) (2) Any doubt that plaintiff has not made the necessary showing of intentional discrimination as required by Village of Arlington Heights v. Metropolitan Development Corporation, 429 U.S. 252 (1977), and Washington v. Davis, 426 U.S. 229 (1976), is dispelled by the fact that the case has been pending for five years and a significant number of children are still unserved. (332) (3) State and local defendants have collectively violated the right of the plaintiff class to equal protection. (322) (4) The inordinate delay in implementation of the state statute and the irreparable harm resulting from loss of education necessitate injunctive relief. (323) (5) Defendant state superintendent of public instruction is required to submit a monitoring report concerning progress in identifying, evaluating, and placing handicapped children; should insufficient progress be shown, a special master will be appointed and strict sanctions and penalties imposed. (323) (6) One local defendant is dropped as representative of the class of defendants because it is in compliance with requirements of the state statute and another local school district is substituted. (323)

P-1 v. Shedd, Civil Action No. H-78-58, D.Conn.
(Consent Decree, 3/23/79) 3 EHLR 551:165, Clearinghouse
#23,385

Consent decree concerning the broad implementation of P.L. 94-142 by the Hartford, Connecticut public schools. While class certification was denied, the terms of the consent decree apply to policies, practices, and procedures concerning the education of the handicapped in the district so that the decree provides system-wide relief. Provisions of the consent decree: (1) Specific provisions and timelines concerning the programming and placement of the named plaintiffs. (p. 551:166-68) (2) A court expert is appointed to oversee the implementation of the consent decree and to report monthly to the court. (p. 551:168) (3) Provisions concerning the implementation of the right to free and appropriate education, education in the least restrictive environment, and the formulation of individualized educational programs are set forth. (p. 551:169-173) (4) A scheme for implementation of procedural protections, including all forms for notice to and consent by parents, is included in the decreee. (p. 551:171). (5) Provisions limiting disciplinary exclusion of handicapped students and requirements for educational evaluations of students who engage in frequent misconduct are set forth. (p. 551:173) (6) A mechanism to identify all students in need of special education is provided. (p. 551:174) (7) Requirements for monitoring the local district by defendant state educational officials is set forth. (p. 551:175) (8) A mechanism for resolving disputes between the parties during the term of the consent decree is included. (p. 551: 165) (9) The district court retains jurisdiction over the case, to review the matter in July, 1980.

Note: The parties are presently negotiating the terms for a modified consent decree for the next school year.

Pehowski v. Blatnik, Civil No. 78-0030-W(H) Order
(N.D.W.Va. 4/14/80)

Action on behalf of 20-year-old woman suffering from Down's Syndrome with resulting mental retardation and, perhaps, physical handicaps who alleges the denial of appropriate educational opportunities in the least restrictive environment in violation of §504 of the Rehabilitation Act (29 U.S.C. §794) and 42 U.S.C. §1983. Action brought against local school board and educational officials, including one of plaintiff's teachers (action against the teacher was dropped when the teacher left her employment with the school system). Plaintiff had been enrolled in one of defendants' special education programs, but left school alleging that she was not receiving an appropriate education in her program, which was located in a self-contained class special education facility for the educable mentally retarded. Rulings (in granting declaratory relief): (1) Although plaintiff did not so move, plaintiff is granted leave to amend her complaint to allege violations of P.L. 94-142 (20 U.S.C. §§1401 et seq.). (p.12) (2) Plaintiff is granted leave to amend her complaint to include not only alleged violations of her right to education in 1976 and 1977 but also alleged violations from 1977 to the present. (p.13) (3) Although she did not so move, plaintiff is granted leave to move the court to certify this action as a class action. (p.13) (4) The court declines to enter any injunctive relief or final relief, urging the parties to come forward with further evidence. (pp. 9, 13) (5) Plaintiff is " an otherwise qualified handicapped individual within the meaning of 29 U.S.C. §794."' (p.9) (6) Defendants did not discriminate against plaintiff because of her handicapped condition in violation of §504. (p.10) (7) Plaintiff had one teacher who may have been less than competent, however, rights and liabilities under either §504 of P.L. 94-142 "are not dependent upon the competence or lack thereof of a single teacher. The question of the appropriateness of the education provided any handicapped student is one to be determined upon the overall program and many other factors." (p.10) (8) "Defendants have not failed to provide plaintiff with an appropriate education within the meaning of 45 C.F.R. §84.33(a) and (b) at times subsequent to 1977." (p.10) (9) The education provided to trainable and severely retarded students in the school district from 1977 to the present is, as far as educational curriculum programs, and instruction are concerned, not inappropriate and not unequal to that afforded non-handicapped students. The court, however, makes no findings on the adequacy of extracurricular programs currently available to mentally retarded students. (p.11) (10) "The defendants' policy of automatically assigning all students designated by defendants to be trainable mentally retarded or severely retarded to the segregated [by handicap] schools in the system, violates Section 504. . .and violates the concept of mainstreaming as embodied in [P.L. 94-142]." (p.11) (11) The physical facility of one of the special schools is not equal or equivalent to the physical facilities at which non-handicapped students are educated; this violates §504. (p.12) (12) Plaintiff was not required to exhaust any administrative remedies that may have been available because defendants' unlawful practice is a systematic practice not susceptible to resolution via administrative remedies. (p.12).

Rowley v. *Board of Education of Hendrick Hudson Central School District*, 483 F.Supp.528 (S.D.N.Y. 1980), *aff'd* 632 F.2d 945 (C.A.2, 1980).

Action by an 8 year-old deaf child and her parents for school district's failure to provide plaintiff with the services of a sign language interpreter in the classroom. Plaintiffs allege that the school district's committee on the handicapped failed to recommend that the services of an interpreter be included in plaintiff's I.E.P. Defendants refused to provide such services since plaintiff was making substantial academic progress. Plaintiff's parents objected to the I.E.P. as it failed to provide for an interpreter. After appeals up to and through the Commissioner of Education, they bring this civil action pursuant to P.L. 94-142 (20 U.S.C. §§1401 *et seq.*) alleging failure to provide plaintiff with a sign language interpreter deprives her of an appropriate education as required by law. *Rulings* (in granting plaintiffs' motion for a preliminary injunction): (1) The definition of an appropriate education is not clear. It could mean,"an education susbstantial enough to facilitate a child's progress from one grade to another and to enable him to earn a high school diploma." It could also mean an education "which enables the handicapped child to achieve his or her full potential." However, rather than these two extremes, the standard should be one which would "require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children." (p.11) (2) "Appropriate education" requires something more than "adequate" education but, since even the best public schools lack the resources to enable every child to achieve his full potential, schools are not required to afford students a chance to maximize their potential. (p.11) (3) The fact that plaintiff's academic performance is better than the average child is *not* definitive evidence that she is receiving an appropriate education. (p. 12) (4) In alleging that plaintiff is receiving an appropriate education as evidenced by her academic advancements, defendants have failed to compare her performance to that of a non-handicapped student of similar intellectual calibre and initiative.

Such a comparison indicates plaintiff has an "education shortfall" greater than that of her peers. (p.15) (5) Expert testimony indicates that every deaf child fares better in school when they have an interpreter. This generalization applies to plaintiff as well. (p.16) (6) There does not appear to be any evidence which would suggest that an interpreter for plaintiff would be disruptive to the teacher or plaintiff's classmates. (p. 17-18)

Note: This case is on appeal to the United States Court of Appeals, Second Circuit (No. 80-7098), appellate briefs and two amicus briefs submitted in that appeal are reprinted at 3 EHLR 551:584.

Rowley v. Board of Education of the Hendrick Hudson Central School District, 632 F.2d 945 (2nd Cir. 1980) 3 EHLR 552:101; Briefs of Parties Reported at 3 EHLR 551:584.

Appeal from district court decision that deaf student is entitled sign language interpreter services under P.L. 94-142 (20 U.S.C. §§1401 et seq.), which guarantees a free appropriate education to handicapped students. See 483 F.Supp. 536 (S.D.N.Y. 1980) Rulings (in affirming): (1) The provisions of 20 U.S.C. §1415(e)(2), require that the district court's decision must be based "on the preponderance of the evidence." Such was the case here. (p.947). (2) The decision here is based upon the unique facts of this case and is not intended as authority beyond this case. (p.948) (3) One judge, dissenting: (a) Under the definition of "appropriate education" set forth in the statute, definition of the scope and range of appropriate education is left primarily to the states. The New York plan for the provision of special education does not provide for deaf interpreter services. (p.951). (b) It is not appropriate in ths case to define "appropriate education" according to the standards set forth the regulations promulgated under Section 504 of the Rehabilitation Act. (pp. 951-52) (c) The aim of P.L. 94-142 is to develop a handicapped child's self-sufficiency rather than to allow a handicapped child his full potential commensurate with the opportunity provided to other children. (p.953) (d) The courts should not substitute the judgment for that of specially trained hearing officers in a case such as this. (p.953) (e) The district court erred in accepting affidavit testimony since no opportunity had been afforded to cross-examine the affiants or offer rebuttal testimony since the affidavits were not offered during the administrative hearings. (pp.954-55).

Note: A petition for certiorari has been filed. Docket No. 80-1002. See 49 U.S.L.W. 3495.

Savka v. Commonwealth, 403 A.2d 142 (Commonwealth Court, Pa., 1979)

Action by a 17 year-old hearing impaired child to prevent his transfer from DePaul Institute, a private school for exceptional children, to the intermediate educational agency's facility at Edgewood Elementary School. After the Intermediate Unit recommended that plaintiff be transferred to Edgewood, plaintiff requested a due process hearing pursuant to 22 Pa.Code §13.32(9). The hearing examiner determined that Edgewood was an appropriate placement for plaintiff. However, he recommended that since the school year was already in progress, plaintiff's transfer should be delayed until the following year. Plaintiff now appeals the hearing officer's decision. Rulings (in affirming): (1) Pursuant to §1372(3) of the Code, 24 P.S. §13-1372(3) a child will be placed in a private school only if neither the local school district nor its intermediate unit can provide an appropriate education for the handicapped child involved. (p. 144) (2) A review of the child's records coupled with the "testimony presented. . .describing class size, facilities, teacher certification, mainstreaming, opportunities, and [Edgewood's] total communication approach to teaching the hearing-impaired, we find there was more than sufficient evidence to support the Secretary's findings on the ability of Edgewood to provide Chad [plaintiff] with an appropriate education." (p.145) (3) The Secretary of Education has the authority to delay plaintiff's transfer until the following school year as it is in the best interests of the child. (p.145) (4) Pursuant to the Rules of Administrative Practice and Procedure, plaintiff must object at the due process hearing, not after, if he feels he was denied an impartial hearing because the hearing officer was an employee of another intermediate unit. (p.145)

Note: No claims under federal statutes were raised here nor addressed by the court.

Springdale School District v. Sherry Grace and the Arkansas Dept. of Education, 494 F.Supp. 266
(W.D.Ark. 1980) 3 EHLR 552:191

Action by Springdale School District against parents of a profoundly deaf child, seeking placement of the child in the Arkansas School for the Deaf rather than the Springdale public schools. Defendant child (Sherry) has been profoundly deaf since birth. After three years at the Arkansas School for the Deaf Sherry had learned communications skills and could communicate with teachers and other students. Defendants' parents then sought to place her in the public school system. The school's IEP recommended placement back in the Arkansas School for the Deaf, which the parents rejected. A temporary IEP was developed requiring Sherry to remain in a regular classroom with placement in a resource room two hours a day for special instruction. The parents, disagreeing with the original IEP, initiated a due process hearing which found in favor of the parents and recommended continued placement at Springdale. The school therefore began to provide a full-time interpreter to Sherry. The Springdale School then brought this action pursuant to P.L. 94-142, 20 U.S.C. §1401 et seq. seeking Sherry's placement at the Arkansas School for the Deaf. The parents filed a counterclaim, seeking an injunction requiring the school to hire a teacher for the deaf and the provision of a summer program to make up for educational deficiencies. Rulings (for defendants): (1) Due to Arkansas School for the Deaf's number of teachers who are skilled to teach hearing impaired children, the teachers' function as role models, the atmosphere which would allow Sherry to interact with other deaf people and use her communication skills and the facilities tailored for teaching the deaf, it is clear that the Arkansas School for the Deaf would provide the best free education for Sherry. (pp. 271-2) (2) However, P.L. 94-142 does not require a state to provide each child with the best education for him/her. Rather, it requires a free appropriate education. (p.272). (3) The standard for determining what constitutes an appropriate education was established in Rowley v. Board of Education of Hendrick Hudson Central School Dist., 483 F.Supp. 528 (S.D.N.Y. 1980) (Bulletin, p.893) where the court held that an appropriate education requires that "each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children." (p.272). (4) "When we compare what Springfield School delivers to its nonhandicapped students with what it must provide to Sherry Grace under the terms of the IEP, we find by a preponderance of the evidence, that Sherry Grace can receive an 'appropriate' education while enrolled at the Springfield school." (p.273) (5) "Although it is likely that Sherry could learn much more quickly at the Arkansas School for the Deaf, we note that both the Arkansas School for the Deaf and the Springdale School would be teaching the same subjects to her through certified teachers for the deaf." (p.273) (6) "The plaintiff has not evinced one fact about Sherry which indicates that she cannot receive an appropriate education at the Springdale School, although plaintiff thoroughly proved that the Arkansas School for the Deaf was preferable." (p.273) (7) Placement at the Springdale School is in keeping with the requirement of mainsteaming; placement at the Arkansas School for the Deaf would deny Sherry of contacts with nonhandicapped children during the regular school day. (p.273) (8) Defendants counter-claim seeking an injunction requiring Springdale to hire a certified teacher of the deaf to implement the IEP is granted (to apply to the 1980-81 school term only). (p.272). (9) Plaintiffs counter-claim seeking an injunction to provide a summer program to remedy the deficiencies which occurred during the 1979-80 school term is denied, since there is little time to implement such a program before the 1980-81 school year begins. (p.274). (10) The family's counterclaim for attorney's fees is denied because there is no statutory basis for it since 13 U.S.C. §1244(e) is inapplicable. (p. 274).

West Chester Area School District v. Commonwealth of
Pennsylvania Secretary of Education, 401 A.2d 610
(Commonwealth Ct. of Pa., 1979)

Action by West Chester Area School District seeking review of the Secretary of Education's affirmation of a hearing officer's determination that a day school program was the appropriate educational placement for a socially and emotionally disturbed child who lived in the school district. The child's parents preferred placement in a day program after hearing of alleged sexual and physical abuse of students at the recommended residential program. The school district recommended residential placement, alleging that the necessary care and treatment could best be provided by a residential treatment facility. This appeal is brought, challenging whether the Secretary's decision recommending placement in a day program was supported by substantial evidence. Rulings (in affirming decision of hearing officer): (1) The standard for reviewing the Secretary's adjudication is "to affirm his decision unless a violation of constitutional rights has occurred, an error of law has been committed, or the findings of fact are not supported by substantial evidence." (p.612) (2) While the residential treatment facility recommended by the District appears to meet its basic obligation to provide some form of special education, "before a District can recommend placement outside the District, it must be evident that, because of the nature or incidence of the student's handicapping condition, it is unable to operate an appropriate education program." (see Pa.Code §13.11(b), §171.13)(p.612) (3) If a child is in need of outside treatment facilities the school district must comply with the priority aid of placement found at 22 Pa.Code §13.11(d) and 161.16(c) (i.e. placement must be in the least restrictive environment).(p.612) (4) A student may not be assigned to an approved private or state school program if his educational needs can be met in a district's regular special education program including homebound instruction. (p.612) (5) "[T]he secretary's order recommending placement in a day school to be supplemented by adequate outside psychotherapy and requisite family involvement is supported by substantial evidence." (p.613).

Windward School v. *The State of New York*, No. 78 Civ. 3474
(LBS)(Order on Preliminary Injunction, S.D.N.Y. 1978)
3 EHLR 551:219

Action by a private school (the Windward School) and children with specific learning disabilities who were students at that school for alleged violations of P.L. 94-142 (20 U.S.C. §§1401 *et seq*.) and the Rehabilitation Act of 1973 due to state educational agency's decision to deny Windward School permanent funding even though the school has been granted one year conditional approval. Because of this funding denial and the fact that other appropriate placements were allegedly unavailable plaintiffs alleged that they are being denied their right to a free appropriate education since reimbursement to parents for special education costs are only allowed in approved schools. *Rulings* (in denying preliminary injunction): (1) "The one year conditional approval which it received conferred upon Windward no enforceable property right to be used permanently for the education of public school students," therefore, the school has no standing or cause of action and it is inappropriate for the court to interfere, particularly with a preliminary injunction. (p.551:220) Plaintiff students do have standing to assert a claim of denial of appropriate education under P.L. 94-142. (2) While defendants allege that by the beginning of the school year all displaced students from the Windward School will be appropriately placed in another program, the placement process is still in a state of flux and it is impossible for the court to make a determination of any P.L. 94-142 or Section 504 violations at this time. (p. 551:221-2) (3) Prior to the beginning of the school year defendants will submit an affidavit reporting the placement status of the children. (p. 551:221) (4) Plaintiffs' motion for a preliminary injunction is denied without prejudice but may be renewed in the event that defendants fail to provide them with appropriate educational placement.

The Windward School v. The State of New York,
(Order, Preliminary Injunction, 11/2/78), EHLR
551:221

Renewed motion by handicapped children alleging defendants' failure to provide them with a free appropriate education after the private school they were attending was denied funding. Plaintiffs alleged that they are entitled to a due process hearing pursuant to 20 U.S.C. §1415 to contest the fact that the private school which they were attending is no longer receiving funding from the state. Plaintiffs allege the right to a due process hearing on "any matters" relating to educational placement or the provision of free appropriate education. Rulings (in denying plaintiffs' renewed motion for preliminary relief): (1) A preliminary injunction may be granted only upon a clear showing of either, "probable success on the merits and possible irreparable injury," or "sufficient serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly towards the party requesting preliminary relief." (2) Absent a showing of clear legislative intent to support their position, plaintiffs are not entitled to prevail. (p. 551:222) (3) "[D]ecisions of the state on the adequacy of a private school program are not matters between a local committee and the parents and not subject to the hearing requirements of §1415." (p.511:222). (4) Pursuant to 20 U.S.C. §1413(a)(4), the state has the right to determine which private schools are adequate to meet the needs of handicapped students. (p.551:222) (5) As §1415 refers to procedures between the local school district and the parents, and because the local school district has no control over the approval of funding to private schools, "the issue of approval cannot logically be the subject of a hearing between the local school district and the parents." (p. 551:223) (6) The provisions of §1415 do not apply to a situation where an entire school is disapproved. (p.551:223) (7) Plaintiffs have not demonstrated irreparable injury as they have failed to produce evidence that their education was delayed or that appropriate education was denied. (p.551:223) (8) If, for those parents who chose to keep their children at Windward, no suitable alternative was offered for their child's placement, retroactive tuition reimbursement would be available. (p.551:223) (9) The balance of hardships does not tip in plaintiffs' favor so as to require an order that would cause the state to support a school which it felt was inappropriate for learning disabled children. (p.551:233).

The Windward School v. The State of New York, (2nd Cir., 6/8/79) EHLR 551:224

This action affirms the decision of the District Court (see 3 EHLR 551:221). Rulings: (1) The plaintiffs have failed to show probable success on the merits. (p.551:224) (2) The balance of hardship does not tip in plaintiffs' favor. (p.551:224)

See Pope §5.5; Frankel §140A; Matter of Reid §140A; Frederick L. §140B; Larry P. §140B; Mattie T. §140B; North Carolina A.R.C. §140B; Riley §140B; Concerned Parents §140C.1; Halderman §140C.1; Lora §140C.1; New York A.R.C. §140C.1; Pennhurst §140C.1; Willie M. §140C.1; Mrs. A.J. §140C.4; Blue §140C.4; Doe v. Koger §140C.4; Doe v. Maher §140C.4; Doe v. School No. 40 §140C.4; E.M. §140C.4; Pratt §140C.4; Stuart §140C.4; Armstrong §140D; Boxall §140D; Cook §140D; Dubner §140D; Erdmann §140D; Gargani §140D; Grynes §140D; Guempel §140D; Kruelle §140D; Kruse §140D; Levine §140D; Lombardi §140D; North §140D; Parker §140D; Schayer §140D; Concerned Parents §140E; Menegas §140E; Sherry §140E; Harris §140F.1; United Cerebal Palsy §140F.1; Sessions §140F.1; Breedon §140F.3; Monahan §140F.3; Lantzer §140F.4; Bd. of Ed. of Northport §185 and §190; Johnson §190.

140C.3 Extracurricular Activities

Colombo v. Sewanhaka Central High School District No. 2, 383 N.Y.S.2d 518 (S.Ct., Nassau Cty., 1976)

Proceeding seeking to overturn a school district directive, based upon advice from the district's physician, prohibiting a student from participating in contact sports. The school doctor found that the student was totally deaf in one ear and had a 50% loss of hearing in the other ear. The doctor reasoned in part that the student was generally more susceptible to injuries because of his inability to directionalize sound. The student argued that the doctor's decision failed to consider such factors as his parents' consent to his participation, his athletic talents, his past athletic experiences, and the psychological effect of the decision. The student presented considerable evidence in support of his petition to overturn the district's decision, including testimony from persons familiar with the participation of deaf persons in contact sports, in the "Deaf Olympics," and in colleges and other schools that hearing impairment had not led to injury in contact sports. The opinion of the district's physician was also supported by other authority. Rulings (in favor of respondent): (1) There are "at least conflicting views" on whether the student's participation in contact sports represents a danger to his physical well-being or to the safety of other participants. An administrative determination, made on a rational basis, should not be judicially set aside. It is not the court's function to substitute its judgment for that of the school board, especially since the board's judgment was based on medical advice. (521-22) (2) Given the evidence of the danger to the ear in which there is partial hearing, the greater risk of injury to other parts of the body, and the risk of injury to other participants, exclusion from participation "was a valid exercise of judgment and was not arbitrary or capricious...." (522)

Doe v. Marshall, 459 F.Supp. 1190 (S.D. Tex., 1978)

Action by special needs student, pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §794, challenging rule of athletic association under which he would be ineligible to play football in his senior year at Alvin High School. Plaintiff had played in another district in his junior year. He moved to Alvin to live with his maternal grandparents, upon recommendation of his therapist, after his ongoing "emotional illness" produced a violent reaction against his parents. The association's rules did not provide for the eligibility of transfer students in this situation. The Alvin school district was willing to allow plaintiff to play football. Rulings (in granting preliminary injunctive relief): (1) 29 U.S.C. §794 creates a private right of action. (1192) (2) The plaintiff-parent has exhausted administrative remedies. (1191) (3) In the circumstances of this case, the minor plaintiff's playing football is part of "the individualized treatment which Section 794 mandates." (1191-92)

Doe v. Marshall, 622 F.2d, 118 (C.A.5, 1980), 3 EHLR 552:157 (Clearinghouse #29,877).

Appeal of district court order allowing an emotionally handicapped individual to play football despite University Interscholastic League (UIL) objections. During the pendency of this appeal, appellee graduated from high school. Appellants contend that despite an appearance of mootness, this case is "incapable of repetition, yet evading review" and thus an exception to mootness. Appellants also contend that the fact that appellees were required to post a $15.00 injunction bond and their request for attorneys fees keeps the controversy alive. Rulings (in vacating the preliminary injunction as moot): (1) Since appellee has graduated and this suit was not brought as a class action nor did appellant seek damages, there is no longer a justiciable case or controversy and the case is moot. (p. 119) (2) This case is similar to Defunis v. Odegard, 416 U.S. 312 (1974) in that the student has completed his final term in school and "'will never again be required to run the gauntlet'" of the UIL's transfer policies. Furthermore there is no reason to believe that future attacks on UIL's rule will similarly evade review. (p.119) (3) This case fails to meet the tests set out in Walsh v. Lousiana High School Athletic Association, 616 F.2d 152 (5th Cir., 1980), in that "the effect of the rule is not too short in duration to be fully litigation prior to its cessation or expiration, and there is no reasonable expectation that the plaintiff will be subjected to the same difficulties again." (p. 119) (4) The injunction bond in this case is distinguishable from that in Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980) in that the bond in Camenisch could not be discharged without an adjudication on the merits and was for a substantially greater amount ($3,000) than the bond involved in the instant case. (p. 120) (5) A determination of mootness does not prevent an award of attorneys' fees on remand. (p. 120)

Evans v. Looney, C.A. No. 77-6052-CV-SJ, W.D. Mo., Consent Judgment, 9/2/77

Action by two college students who were disqualified from participation on the football team at Missouri Western College because they were blind in one eye. Plaintiffs signed statements releasing defendants from any liability for injuries sustained as a result of playing football while blind in one eye. Consent Judgment: (1) Plaintiffs would be irreparably injured if excluded from playing football. (2) Defendants have denied plaintiffs equal protection and due process of law. (3) Defendants are enjoined from excluding plaintiffs.

Note: There is no discussion of any claims which might arise under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

Kampmeier v. Nyquist, 553 F.2d 296 (C.A. 2, 1977)

Appeal from decision denying motion for a preliminary injunction against public school authorities in Pittsford and Canandaigua, New York, who have refused to allow two junior high students, each with vision in only one eye, to participate in contact sports at school. Plaintiffs rely on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the right to equal protection of the law under the Fourteenth Amendment. Rulings (in affirming): (1) Plaintiffs do have standing to sue under §504. (299) (2) Exclusion of handicapped children from a school activity is not improper if there is substantial justification for the school's policy.(299) (3) Section 504 prohibits the exclusion of handicapped persons who are "otherwise qualified" and medical opinion relied on by the defendants indicates that children with only one eye are not qualified to play in contact sports because of the high risk of eye injury. (299-300) (4) Plaintiffs have presented little evidence to cast doubt on the substantiality of this rationale, and have not made a clear showing of probable success on the merits. (299) (5) Public school officials have a parens patriae interest in protecting the well-being of their minor students (300), and the risk of injury to their one good eye by participating in contact sports does not outweigh the deprivation of freedom to participate in contact sports where a host of noncontact sports are open to these students. (300)

Note: The court did not reach appellants' argument that handicapped individuals are a suspect class and thus entitled to strict scrutiny analysis under the equal protection clause.

See Pehowski §140C.2.

140C.4 Discipline of Handicapped

Mrs. A.J. v. Special School District #1, 478 F.Supp. 418 (D.Minn., 1979).

Plaintiff, a junior high school student, challenges a fifteen day disciplinary suspension imposed as a result of a fight at school. The suspension followed a conference between plaintiff and an assistant principal. This suspension was the third suspension in a school year in which plaintiff had frequent disciplinary and academic problems, and was accompanied by a recommendation that plaintiff be placed in a special educational center. One week prior to this suspension, plaintiff's mother had given written consent to an evaluation to determine whether plaintiff was in need of special eeducation services. The evaluation took place during the suspension, along with alternative educational services, the provision of homework assignments, under a state statute requiring the provision of alternate services to suspended students. Following the suspension, plaintiff returned to her regular school for the remaining few days of the school year. In the next academic year, following further problems, plaintiff was placed in the special school which had originally been recommended during the suspension. Plaintiff challenged, under state law, the adequacy of the alternative education offered and the sufficiency of her suspension hearing and presented challenges under the Fourteenth Amendment and P.L. 94-142, the Education for All Handicapped Children Act. Rulings (in granting plaintiff declaratory relief on some, but not all of her claims, and ordering expungement of the suspension from her records): (1) Abstention is not proper since there are constitutional issues posed regardless of the interpretations of the statute which might be made by state courts; since the court had jurisdiction to determine the constitutional issues, it has the discretion to determine state law issues under pendant jurisdiction. (pp. 7-8) (2) State statutes which limits suspension to five school days but also allows consecutive suspensions of up to 15 days if a student presents an "immediate and substantial danger to persons or property" and if an alternative educational program is provided clearly allows for suspensions of more than five days in appropriate circumstances. (pp. 8-10) (3) A school administrator may not, under the state statute, impose consecutive suspensions of a total of fifteen days at an administrative conference. Instead, the state statute would require a separate administrative conference for each five day segment of the fifteen day suspension, with each conference to address the issue of whether the student presents a substantial or immediate danger to persons or property. (pp. 10-11) (4) The state statute cannot be read, consistent with Goss v. Lopez, 419 U.S. 565, to allow a suspension without any hearing whatsoever when a student is thought to present an immediate or substantial danger to persons or property. (pp.11-12) (5) Hearings afforded prior to suspensions, even cumulative suspensions, need not be any more formal than that afforded plaintiff, i.e., a conference with a school administrator. (pp. 14-16) (6) When cumulative suspensions are imposed, notice only needs to be provided prior to the initial suspension and hearing. (p.14) (7) The court need not reach plaintiffs' claim that a 15 day suspension after an informal hearing violates Goss since it already found the suspension unlawful under state statute. (p.24) (8) The adequacy of the provision of homework assignments as the form of alternative education required under the state statute is not a matter of which the court will take cognizance absent a showing of manifest abuse of discretion by school officials in offering the program; no such abuse was established here although some circumstances might exist in which homework is not a sufficient alternative program. (pp. 18-19) (9) Plaintiffs' contentions that students "thought to be handicapped" are entitled to formal hearing procedures prior to a suspension are without merit. (pp. 20-21). (10) Since plaintiff had been referred for an evaluation to determine whether she had any special education needs but had not yet been assessed or afforded procedural rights to notice and a hearing required under P.L. 94-142, 20 U.S.C. §1415(b)(1)(C), and since one goal of the federal statute is to prevent misclassification of students who are not really handicapped, it is incongruous and contrary to the federal law to argue that plaintiff should have been treated as handicapped and afforded more procedural protections because school officials suspected she was handicapped. (pp. 21-23) (11) Plaintiff is entitled to have any reference to the unlawful suspension expunged from her school records. (pp. 24-25) (12) Plaintiff is entitled to equitable relief even if the grounds for her suspension were appropriate, and even if she would have been suspended in any event, since the procedures used in her suspension were deficient under state statute. Citing Piphus v. Carey, 545 F.2d 30, 32 (7th Cir. 1976), rev'd on other grounds, 435 U.S. 247 (1978). (p.25).

Note: this case is on appeal to the Eighth Circuit.

Benton, Robert D., State Superintendent, Iowa,
Letter to John R. Phillips and Kathleen A.
Reiner, 5/4/78 (Clearinghouse #25,213A)

Declaratory ruling of State Superintendent concerning high school special education student who was disruptive and recommended for expulsion. Rulings: (1) "The legislature, in 1975, amended Section 282.3, subsection 1, to preclude...total removal of special education students from educational programs." (p. 2) The specific language of Section 282.3 prevails, to the extent it is inconsistent with the general expulsion authority in Section 282.4 of the Iowa code. (p. 3) (2) The appropriate procedure is to request a reevaluation of the students' special education placement. (p. 3) (3) This conclusion is "nearly identical" to that on federal law in Stuart v. Nappi, 443 F.Supp. 1235 (Conn., 1978)

Blue v. New Haven Board of Education, Civ. No.
N.81-41, D.Conn., Preliminary Injunction, 3/23/81.

Action by a 16 year old seriously emotionally disturbed student on behalf of himself and all other handicapped students in special education programs in the New Haven Public Schools who are subject to the disciplinary procedures employed by the school district. Plaintiff's complaint alleges that the disciplinary procedures deny handicapped students their rights under P.L. 94-142, §504, the Fourteenth Amendment to the U.S. Constitution, §1983, and state law. Rulings (in granting plaintiff's request for a preliminary injunction): (1) Though issuance of a preliminary injunction is a drastic remedy and the burden difficult for a plaintiff to sustain, plaintiff herein "has made a persuasive showing of irreparable harm and likelihood of success on the merits" and is entitled to a preliminary injunction ordering defendants to refrain from conducting an expulsion hearing or taking other actions to expel him and directing defendants to reinstate him in his presuspension special education placement or other educational program agreed to by the parties during the pendency of any proceedings pursuant to 20 U.S.C. §1415. (pp.9-10) (2) Plaintiff has demonstrated likelihood of success on the merits of the following claims: a) the right to remain in one's current educational placement pending resolution of the complaint proceedings under 20 U.S.C. §1415(e)(3); b) the right to have all changes in placement effectuated in accordance with prescribed procedures; c) the right to be educated in the least restrictive environment. (p.11) (3) 20 U.S.C. §1415(e)(3) has been construed to prohibit school officials from taking disciplinary measures against handicapped children which have the effect of changing their educational placement during the pendency of §1415 proceedings. Plaintiff has filed a complaint under 20 U.S.C. §1415(b)(1)(E) requesting a hearing and review of the Pupil Placement Team's diagnosis, evaluation, and recommendation that he be placed in an alternative placement and asking to remain in his current educational placement during the pendency of this matter; no agreement has been made among the parties concerning the different placement, nor any showing made by the defendants that plaintiff poses a danger to himself or others; any attempt to expel plaintiff or otherwise change his educational placement during the pendency of his complaint would violate §1415(e)(3). Defendants having excluded plaintiff from school for more than 10 consecutive days (i.e. an expulsion under Conn.Gen.Stats. §10-233(e)),plaintiff is being denied his right to remain in his present educational placement during the pendency of his special education complaint. (pp. 13-15) (4) Because responsibility for changing the placement of handicapped children rests with a group of trained persons knowledgeable about evaluation data and placement options (e.g, Pupil Placement Teams in Connecticut; see Con.Gen.Stats. §10-76d), plaintiff is entitled to have his educational placement changed by the Pupil Placement Team, not through the school's normal disciplinary procedures, and to have any Pupil Placement Team placement decision reviewed according to the procedures of §1415(b)-(e). (pp.15-16). (5) Defendants'action in placing plaintiff on homebound instruction pending an expulsion hearing and seeking to place him in an alternative educational placement following his expulsion, deprive him of his right to an education in the least restrictive environment. Expulsion may have the effect of excluding plaintiff from a placement that is appropriate for him and restricting the availability of alternative placements in violation of P.L. 94-142. (pp.16-17) (6) Plaintiff has made a persuasive showing that he has suffered and continues to suffer possible irreparable injury as a result of defendants' excluding him from school beyond the 10 day suspension period and placing him on homebound instruction, which imposes a severe limitation on plaintiff's academic and social development; and that he will suffer possible irreparable injuries if he is expelled from school for the remainder of the year through the school's normal disciplinary measures, for such action will preclude him from participating in any special education or other programs offered at the high school. (pp.18-19).

Commonwealth of Massachusetts on Behalf of the Dept. of Education and John K. v. Arlington School Committee, No. 79-5263 (Super.Ct., Mass., Memorandum and Order, 10/15/79). In re John K., Mass. Dept. Educ., Div. Spec. Ed., Bureau of Special Ed. Appeals #2494, Decision.

Action seeking to compel the defendant school committee to comply with an order of the Massachusetts Department of Education's Bureau of Special Education Appeals pursuant to the state special education act, G.L. ch.71B (Chapter 766 of the Acts of 1972). The issue before the court was whether a school committee can lawfully refuse to comply with the Bureau's order to implement an Individual Education Plan (I.E.P.) requiring a student's enrollment in a given public school, solely because the school committee believes the Bureau hearing officer signing the order exceeded her authority. An appeal has been filed with the Bureau which challenged the indefinite suspension of a 17 year-old handicapped student with emotional problems from Arlington High School after he was involved in an altercation with a faculty member in February 1979, and the refusal by school authorities to provide him with educational services at the high school. Following a full evaluation, school officials rejected the evaluation team's proposed I.E.P. in April 1979, calling for the boy's educational placement at the high school in 1979-80. The school contended that it could not provide him with an appropriate program to meet his special needs, nor ensure his safety because of feelings of hostility among administrators, faculty and some students. The Bureau hearing officer found that this particular student's special needs could be met adequately and appropriately in an alternative program offered at Arlington High School for 1979-80; that state and federal laws guarantee special needs students the right to a free appropriate public education in the least restrictive environment (BSEA decision, p.9); that expulsions or indefinite suspensions of special needs students are prohibited by state and federal law (BSEA decision, pp.9-10); that the regulations under Ch.766 require prior approval of the Division of Special Education for changes of a student's program that go beyond an emergency very short term suspension and no such approval was granted (BSEA decision p.10); that a single incident of disruptive behavior, followed by the student's voluntary discussions of that incident with a faculty person, cannot sustain a finding that this student is dangerous to himself or others or substantially disruptive (BSEA decision, p.11); and that the student should be reinstated at Arlington High School and placed in the alternative program geared to vocational training, which is appropriate to meet his special needs and is in accordance with the I.E.P. agreed to by his parents. (BSEA decision, p.12). The defendant school committee failed to appeal the Bureau hearing officer's decision, yet expressly declined to comply with said decision to implement the I.E.P. at Arlington High School. Rulings (in granting plaintiffs' motion for a preliminary injunction): (1) At this stage of litigation, the court need not determine the adequacy of the Bureau's findings and substantiality of the evidence supporting them. (Memo and Order, p.5) (2) Once the Bureau has reached a decision, the school committee may not insist on further attempts to influence the decision-making process and must implement the program "forthwith, without any unnecessary delay," Amherst-Pelham Regional School Committee v. Dept. of Education, 381 N.E.2d 922, 928 (1978); it may appeal to this court within 30 days after the decision but must obey the

Bureau's decision; it may not, without prior approval of the Department of Education, rely on an indefinite suspension to refuse to honor the placement; and may not decline to obey the Bureau's order because of alleged inability to guarantee the student's safety. (Memo and Order, pp.5-6) (3) Not having appealed the Bureau's decision of 9/18/79, the order embodied in the decision stands and must be obeyed. If an appeal has been or is filed prior to expectation of the appeal time, the order must be obeyed pending final disposition of the appeal. (Memo and Order, p.6) (4) Where the parent desires a particular program, the burden of persuasion rests heavily on the school committee to show this court that "such placement would seriously endanger the health or safety of the child or substantially disrupt the program for other students." Where a parent rejects the Bureau's recommendations, the statute allows a dispensation from immediate placement if it "endangers the health or safety of the child or substantially disrupts such education program for other children;" nothing is said of court proceedings or the burden of persuasion. (Memo and Order pp.6-7) (5) Despite the absence of exemptive language in the present situation where a school committee resists a parent-accepted Bureau order, the statute's protective aims and common sense suggest that the committee be permitted to raise the issue of safety. (Memo and Order, p.7) (6) The statutory goals require that to excuse non-compliance on this ground, particularly susceptible of abuse, the commmittee establish a genuine probability of serious danger to the child or substantial disruption of the program. Fears alone do not suffice. (Memo and Order, p.7) (7) The record contains no evidence warranting the court's finding either danger or potential disruption. Defendants' refusal to obey the order rests on a belief that the hearing officer exceeded her authority. (Memo and Order, p.7) (8) The hearing officer ordered implementation of the student's I.E.P. after receiving the evidence and hearing the school defendant's arguments, and thus, acted within the scope of her authority under c.71B §3, M.G.L., and the Regulations, Reg. 403.1. "The School Committee was and is bound to obey the order." (Memo and Order, pp.7-8)

Doe v. Koger, 480 F.Supp. 225 (N.D.Ind., South Bend Div., 1979)

Action challenging the disciplinary expulsion of a mildly mentally handicapped student from school. Student was expelled from school for the balance of a school year following a hearing pursuant to state procedures on school discipline. Following the disciplinary expulsion, the student requested an administrative appeal under special education procedures, but instead instituted the federal action. Challenge brought under 14th Amendment, §504 of the Rehabilitation Act of 1973 (29U.S.C. §794), and P.L. 94-142 (20 U.S.C. §§1401 et seq.). Rulings (in denying Motion for Class Certification, denying Defendants' Motion to Dismiss, for a Stay, and for Summary Judgment, and Granting in Part Plaintiffs' Motion for Partial Summary Judgment): (1) When Plaintiff seeks to represent a class of all children in the school district who are, or will be in the future, in need of special education, the class cannot be certified because the constitutional claim of the class is void since the claim involves no present case or controversy. (p.227) (2) Plaintiff has not alleged that a class composed of handicapped students actually suspended or expelled is so numerous that joinder is impracticable. (p.227) (3) A class claim seeking relief under P.L. 94-142 is inappropriate since the named plaintiff has not exhausted the administrative remedies available under that statute and the relief sought is an order requiring state and local officials to change their suspension and expulsion policies. (p.227) (4) Since HEW has apparently not set up administrative procedures for providing individual students with redress for a school's failure to comply with HEW regulations, exhaustion would not be required of a class of plaintiffs seeking compensatory damages under P.L. 94-142. Here, however, there is no proof of numerosity sufficient for class certification. (p.227) (5) Since there is no HEW administrative procedure under P.L. 94-142 to provide for the compensation of individual students whose rights have been violated under that act, no exhaustion of administrative remedies is required since none are available. (p. 228) (6) Because local and state administrative remedies available do not provide for a challenge to the procedure by which plaintiff was expelled, exhaustion is not required. (p.228) (7) "A school which accepts Handicapped Act funds is prohibited from expelling students whose handicaps cause them to be disruptive. The school is allowed only to transfer the disruptive student to an appropriate, more restrictive, environment." (Citing Stuart v. Nappi, 443 F.Supp. 1235 (D.Conn. 1978)(p.228) (8) P.L. 94-142 limits not only formal expulsions, but also informal expulsions, such exclusions can only last for the period of time it takes to place the student in the appropriate, more restrictive environment. (p.229) (9) 20 U.S.C. §1415 and its implementing regulations do not prohibit the expulsion of handicapped students unless the reason for the student's disruptive behavior is the handicap." While 20 U.S.C. §1412 and its accompanying regulations require schools to guarantee that handicapped students have the right to be educated, they do not require schools to guarantee that handicapped students be educated. . .For an appropriately placed handicapped child, expulsion is just as available as for any other child." (p.229) (10) "Before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. . .and this issue must be determined through the change in placement procedures required by the Handicapped Act." (p.229) (11) Expulsion of a handicapped student may not be considered until it has been established that the disruptive behavior is not the result of an inappropriate placement. (p.229) (12) Whether a student is entitled to compensatory damages depends upon whether a student would have been expelled even if appropriate procedures had been followed. (p.229) (13) Plaintiff would have failed to state a successful equal protection claim that bars expulsion of handicapped students since the equal protection clause does not require that a state guarantee more education to students with a greater need of education, but only that all be guaranteed an equal educational opportunity. (p.230)

Doe v. Maher et al., No. C-80-4270-MHP, N.D. Cal., Preliminary Injunction, 12/12/80.

Action under P.L. 94-142, §504, 42 U.S.C. §1983, and due process clause of the Fourteenth Amendment to U.S. Const. by a 17 year old multi-handicapped student who challenges his exclusion from school for purported disciplinary reasons. Rulings (in granting a preliminary injunction): (1) Great injury and irreparable harm to plaintiff will result if he is prevented from remaining in his current educational placement while efforts are made to find him a new educational placement consistent with the Individualized Education Program meeting of 12/1/80 and any further proceedings for developing an appropriate I.E.P. (2) Plaintiff has demonstrated a strong likelihood of success on the merits in that: a) defendants do not appear to have complied with the requirements of 20 U.S.C. §1415 and its implementing regulations prior to changing plaintiff's educational placement, and exceeded the suspension provisions of Cal.Educ.Code §§49000 *et seq*.; b) 20 U.S.C. §1415(e)(3), 34 C.F.R. §300.513(a) and Cal.Educ.Code §56505(d) as amended by Ch.797 of the 1980 Reg.Sess. provide that during the pendency of any hearing proceedings, the pupil shall remain in his/her current educational placement and supersede any contrary state statutes and regulations; c) even if the state suspension and/or exclusion proceedings applied to handicapped students, defendants failed to comply with those provisions in that plaintiff's suspension was longer than the 5 days permitted by statute, no provision exists for extending a suspension pending exclusion proceedings, and contrary to state law no notice of the district's intent to exclude plaintiff was provided prior to his removal from his current educational placement. (3) The balance of hardships and the public interest favor allowing plaintiff to remain in his current educational placement pending a proper change of placement. Any hardships to defendants and the public interest in maintaining a safe educational environment must be balanced against the Congressional mandate for providing a free appropriate education for all handicapped children, and retaining them in their current educational placements pursuant to considerations and procedures for changing placements and I.E.P.s; the plaintiff has cooperated with the school by taking steps to reduce any danger he presents to others; the school can provide alternative programs within the present placement until an appropriate placement is found; and emergency procedures exist if the school finds it necessary to suspend the plaintiff. (4) Where plaintiff's removal from his educational placement was not in accord with the change of placement procedures, no administrative remedy need be exhausted prior to his obtaining this interim relief. (5) Defendants are enjoined from excluding plaintiff from his regularly assigned classes and his current educational placement unless the educational agency and his parent agree otherwise or a new placement is developed in accordance with plaintiff's I.E.P. and all administrative and judicial proceedings are completed. (6) Defendants "shall comply in good faith with the spirit as well as the letter of this injunction. . ."

Doe v. *School Administrative Unit No. 40*, Civil No. 80-90-D (D.N.H. 1/15/80)

Action on behalf of learning disabled special education student, with long history of academic and behavioral problems, who challenges a twenty-one day suspension from school on grounds that the discipline violates P.L. 94-142 (20 U.S.C. §§1401 *et seq*.), §504 of the Rehabilitation Act (29 U.S.C. §794), and the Fourteenth Amendment. Plaintiff was receiving special education for his learning disabilities under an I.E.P., was re-evaluated after the incident leading to the suspension and found not to be emotionally disturbed, but had a new I.E.P. written just before the court hearing as a result of the discipline problem. *Rulings* (in granting in part and denying in part plaintiff's motions for preliminary injunction relief): (1) the temporary suspension of a handicapped student for no more than ten consecutive school days does not constitute a change in that student's placement that would require adherence to the procedural safeguards regarding removal in P.L. 94-142 or §504. (p.19) (2) A 21 day suspension, as proposed here, may well constitute a change in placement for which procedural safeguards must be provided. (p.20) (3) Because the evidence indicates that plaintiff's disciplinary problems were linked with family problems at home, it has not been established that his disruptive behavior has been caused to a substantial degree by his handicap or by his current placement program. (pp. 20-21) (4) The present record does not indicate a disparity, which violates due process, between the offenses which prompted the suspension, the handicapping condition, and the discipline imposed. (p.23) (5) No violation of equal protection, in the form of discrimination on the basis of handicap, had been established since there is not sufficient proof that plaintiff's disciplinary infraction was substantially related to his learning disability or the school's attempt to remedy the handicapping condition. (p.23) (6) After balancing the interests of both the school and the student, the interests of all concerned would be best served by implementing the change in placement in the student's new I.E.P. and limiting his suspension to ten days (pp.24-27).

E.M. v. Brown, Consent Decree, Civil Action #79-1084-C(2) (E.D.Mo., 1979)

Action brought by plaintiff, a handicapped student, pursuant to P.L. 94-142, Education for All Handicapped Children Act, for alleged unlawful disciplinary exclusion from school. Settlement agreement: (1) Plaintiff will be enrolled in special education program. (p.2) (2) No. change will be made in plaintiff's educational program without following special education due process procedural safeguards. (3) The suspension and proposed expulsion of plaintiff are terminated. (p.2) (4) Any new proposed disciplinary action leading to a change in placement for plaintiff will be referred to his I.E.P. team; emergency removal will be allowed only if the I.E.P. team is convened immediately thereafter. (p.2) (5) Parties will pay their respective costs.

In re Mrs. H., Rulings of Michigan Department of Education, 5/22/80

Investigation of the Anne Arbor Public Schools was conducted after complaint was made by the mother of an emotionally impaired boy when the child's educational program was changed without notice or the drafting of a new I.E.P. The child in question was transferred to an alternative program after suspension for setting off school fire alarms. Violations of state and federal law are alleged (specifically violations of 45 C.F.R. §§121a.345, 121a.342(b)(1), 121a.344). Rulings: (1) While the correct legal solution would be to return the child to his present placement, he may remain in the alternative placement while he is on suspension. (p.2) (2) An evaluation and placement meeting must be convened within a week in order to consider the behavior in relationship to the impairment as well as appropriate programs and services to be rendered. (p.2) (3) Notice of the decision must be made in order to comply with state and federal laws. Options and reasons for placement must be documented. (p.2) (4) Only after the child is deemed to be receiving an appropriate education can he be subject to normal disciplinary suspension and expulsion procedures. (p.2) (5) Parents must be informed of their rights to review and object to any educational records contained in the child's files. (p.3).

Laster v. Huecker Complaint (7/14/80); Answer; Defendants' Response to Motion for Temporary Restraining Order or in the Alternative for Preliminary Injunction (8/20/80); Brief in Support of Motion for Temporary Restraining Order or Preliminary Injunction; Consent Decree. Mo. 80-6042. (Clearinghouse #30,233A-E).

Action by sixteen year old boy who requires rehabilitation services due to a congenital heart problem and severe head injuries suffered in a car accident. Plaintiff alleges he was wrongfully discharged from his rehabilitative program without due process of law. Plaintiff was enrolled in the Hot Springs Rehabilitation Center in a program designed to provide plaintiff with adequate vocational training to receive remunerative employment and to complete his education by obtaining a GED certificate for high school equivalency. He was to complete his program in October, 1980. On July 7, 1980, however, Plaintiff was discharged from the program without an explanation other than that he had been given a disciplinary discharge for "behavior problems." Plaintiff was denied a due process hearing after requesting one. Plaintiff alleges such denial constitutes a denial of due process of law as required by the Fourteenth Amendment. Plaintiff alleges that he was subjected to an unlawful search and denied the right to consult with his legal counsel. Plaintiff seeks a declaratory judgment; preliminary and permanent relief enjoining defendants from their current policies and practices; and $1,000 in damages. Consent Decree: (1) Defendants agree to hold a hearing by August 27, 1980, to review plaintiff's disciplinary discharge. If no hearing is held by then, defendants will re-admit plaintiff to the program. (2) Defendants will notify the plaintiff in writing of the hearing three days before the scheduled hearing. (3) At the hearing, defendants shall give plaintiff notice of the conduct which forms the basis for disciplinary discharge. (4) Plaintiff shall have the right to counsel and to examine and cross-examine witnesses.

Pratt v. Board of Education of Frederick County, 501 F.Supp. 232 (D.Md. 1980)

Plaintiff, an emotionally disturbed student, seeks to require defendant school district to develop an individualized education program (IEP) which would include, inter alia, an individualized disciplinary program. Plaintiff had been suspended from school a number of times and was finally placed on an extended suspension, with homebound instruction, for most of the school year just prior to commencement of this action. In the beginning of the school year, the parties attempted to negotiate a new placement, but were unable to agree on whether the IEP could contain provisions concerning discipline. Rulings: (1) Every IEP, including the IEP in this case, must be individually tailored to meet the needs of the individual handicapped child. (p.235) (2) A procedure is set forth for arriving at an IEP for this student. (p.235)

Rodriguez v. Board of Education of the Cato-Meridian
Central School District, C.A. No. 80-CV-100T, N.D.N.Y.,
Temporary Restraining Order(12/18/80);Stipulation (12/18/80)

Action under P.L. 94-142, §504, and the Fourteenth Amendment, U.S. Constitution by a 17 year old student who challenges his exclusion from school for purported disciplinary reasons. The plaintiff,who suffers from a brain dysfunction which causes epileptic-type seizures,has not been identified as handicapped under the federal laws although, it is alleged, that as a result of his condition and the medication needed to control it, he suffers from anxiety attacks and has difficulty controlling his temper when under emotional stress. Plaintiff, who challenges, inter alia, school district's failure to identify and evaluate him as a handicapped person, to provide him with a free appropriate public education, to comply with the due process procedures, and change of placement procedures of P.L. 94-142 and §504, seeks injunctive and declaratory relief and damages.

A temporary restraining order was subsequently issued prohibiting the school defendants from taking any further action to exclude the minor plaintiff from his regular educational program. The parties thereafter stipulated as follows: the defendants shall continue to be bound by the terms of the temporary restraining order and shall take no action to exclude the plaintiff from his current educational placement pending final determination of the proceedings of the Committee on the Handicapped, including any administrative or judicial review thereof and any application for a preliminary injunction shall be held in abeyance to abide the outcome of the Committee on the Handicapped proceedings.

S-1 v. Turlington, No. 78-8020-Civ-CA WPB, S.D.Fla.,
Memorandum Opinion, 6/15/79; Complaint 3 EHLR 551:211,
572, 538, 353

Action for preliminary injunctive relief on behalf of 9 handicapped students alleging violations of the Education for All Handicapped Children Act (20 U.S.C. §§1401 et seq.),§504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), and the equal protection and due process clauses of the Fourteenth Amendment. Seven of the plaintiffs were expelled from high school in the fall of 1977, for alleged misconduct. Each was expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school year. Two plaintiffs, not under expulsion orders, allege that they are being denied a free appropriate education in that they have not been properly evaluated and placed, and have been denied an impartial due process hearing under 20 U.S.C. §1415(b)(1)(2). Rulings (in granting preliminary injunctive relief): (1) Eligibility for federal assistance to the states for the education of handicapped children is conditioned upon a state policy assuring all handicapped children a free appropriate public education and a state plan, approved by the Commissioner of Education, setting forth policies and procedures designed to meet this goal. (p.2) (2) Pursuant to the Act and its regulations, handicapped students must be provided a free appropriate education in the least restrictive environment, be evaluated at least every three years, be provided an individualized education program which must be reviewed annually, and be provided certain procedural safeguards. (p.2) (3) Plaintiffs have made an adequate showing of likelihood of success on the merits; the requirements of the Handicapped Act have not been met with respect to the expelled plaintiffs. (p.3) (4) School disciplinary procedures are not totally independent of, nor may they supersede the rights of students under the Handicapped Act. (p.3) (5) Defendants' contention that a handicapped student cannot be expelled for misconduct which is a manifestation of the handicap itself, provided such student is classified as "seriously emotionally disturbed," is a generalization contrary to Congress' emphasis on individualized evaluation and consideration of the problems and needs of handicapped students. (pp. 3-4) (6) No adequate determination was ever made of the relationship, vel non, between the handicaps of the 7 expelled plaintiffs and their behavioral problems. The singular finding that the misconduct of S-1 was unrelated to his handicap was made by school board officials lacking the expertise necessary to make such a decision. (p.4) (7) This Court agrees with the conclusion of Stuart v. Nappi, 443 F.Supp. 1235 (D.Conn. 1978), finding expulsion to be a change of placement within the meaning of the Handicapped Act. Evaluations and placement decisions must be made by a specialized, knowledgeable group of persons, 45 C.F.R. §§121a.532(3), 121a.533(a)(3); only such a trained, specialized group is capable of determining whether the student's handicap bears a causal relationship to his misconduct. (p.4) (8) Although the expulsions in question occurred prior to the date the Handicapped Act became effective in Florida, plaintiffs became entitled to its protections on September 1, 1978. Section 504 of the Rehabilitation Act and its implementing regulations, 45 C.F.R. Part 84, were in effect at the time of the expulsions. (p.4) (9) A likelihood of success has been shown as to plaintiffs S-7 and S-9, who were not under expulsion orders. The complaint that they have not been properly evaluated or provided with an individualized program falls within 20 U.S.C. §1415(b)(1)(E), and entitled their parents or guardians to an impartial due process hearing. 20 U.S.C. §1415(b)(2). (pp. 4-5) (10) "Plaintiffs have suffered and continue to suffer irreparable harm each day they are deprived of a free and appropriate education." (p.5) (11) Because of defendants' past refusal to provide plaintiffs their rights under the Handicapped Act, particularly with respect to S-7 and S-9, a preliminary injunction is necessary to insure that plaintiffs will receive their educational and procedural rights under the Act during the pendency of this litigation. (p.6) (12) The balance of harm tips decidedly in favor of the plaintiffs. Entry of a preliminary injunction only requires defendants to fulfill their legal obligations mandated by statute. Defendants' burdens are those placed by Congress and accepted by the state as a condition to obtaining federal funding. (p.6) (13) The public interest will be served by entry of a preliminary injunction. Congress has found that the proper education of handicapped children will be of substantial longe range benefit to society. (p.6) (14) Since plaintiffs failed to show that any handicapped students outside Hendry County or any other handicapped student within Hendry County have been expelled or deprived of a free appropriate education, preliminary injunctive relief is limited to the named plaintiffs. (p.7) (15) The preliminary injunction extends to the defendant state officials and to local officials, for the Handicapped Act imposes on the state education agency the ultimate responsibility for assuring compliance with the Act. 20 U.S.C. §1412(6). Since disciplinary proceedings do not supersede plaintiffs' rights under the Act, state officials' refusal to fulfill their supervisory responsibilities under the Act is unjustified. (p.7) (16) State officials' contention that a mandatory injunction against them is barred by the Eleventh Amendment, in reliance on Alabama v. Pugh, 438 U.S. 781 (1978), is inapposite. Plaintiffs have not sued the State of Florida or its agencies, but have sued various state officials in their individual and official capacities. (p.7)

Note: The court did not find it necessary to determine at this juncture whether a handicapped student may ever be expelled for misconduct unrelated to his handicap. (p.4) This case is on appeal to the Fifth Circuit.

S-1 v. Turlington, 635 F.2d 342 (5th Cir., 1981)

Appeal by Florida's Commissioner of Education, challenging the trial court's finding that plaintiffs, 9 mentally retarded children who had been expelled for alleged misconduct, had suffered irreparable harm in that no handicapped student could be expelled for misconduct related to the handicap since an expulsion is a change of placement and a denial of a free appropriate public education and that an injunction was necessary to ensure that plaintiffs would be provided with their rights. Plaintiffs had been expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school year for alleged misconduct. Only Plaintiff S-1 requested and was given a hearing to determine whether the misconduct was a manifestation of the handicap. The superintendent of schools found that S-1 was not seriously emotionally disturbed and therefore his conduct could not be a manifestation of his handicap. Plaintiffs initiated an action pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.) and Section 504 (29 U.S.C. §794) seeking injunctive relief compelling state and local officials to provide them with the educational services and procedural rights required by P.L. 94-142 and Section 504 and their implementing regulations. The trial court granted injunctive relief and defendants now appeal alleging abuse of discretion by the trial court in granting the relief. Rulings (in affirming): (1) Under Section 504, no handicapped student may be expelled for misconduct which results from or is related to the handicap itself. (p.346-47). (2) An expulsion of a handicapped child resulting in the termination of educational services constitutes a change in educational placement and therefore requires the application of the procedural protections of P.L. 94-142. (p.348). (3) "[E]xpulsion is still a proper disciplinary tool under P.L. 94-142 and Section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period." (p.348) (4) While neither P.L. 94-142 nor Section 504 prescribe whether the state and local authorities or the student has the burden of raising the questionof whether a student's misconduct is a manifestation of the student's handicap, "We feel that the burden is on the local and state defendants to make this determination." Therefore, plaintiffs cannot be assumed to have waived their rights even though they waited 11 months to raise the argument that they could not be expelled unless it was determined by the proper person that their handicap did not bear a causal connection to their misconduct. (p.348-349). (5) Plaintiffs S-7 and S-9 were entitled to due process hearings even though they had voluntarily withdrawn from school. (p.349) (6) The decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979), is not applicable here since the instant case does not deal with physical qualifications for admission or with professional schools. (pp.349-50). (7) While the provisions of P.L. 94-142 did not apply to the state of Florida at the time of the student's expulsion from school, when P.L. 94-142 did become effective, on September 1, 1978, the plaintiffs were protected by the law even though they were out of school. In fact, because they were out of school, the plaintiffs fell within a special class of handicapped students entitled to priority in the provision of services (20 U.S.C. §1412(3)). (p.350). (8) Expulsion of a handicapped student is appropriate only if a qualified group of individuals determines that no relationship exists between the student's handicap and his/her misconduct. (p.350). (9) While disciplinary matters are generally a local matter, it is not solely a local issue with regard to handicapped students. Pursuant to 20 U.S.C. §1412(6), state officials were empowered to intervene in the expulsion proceddings and therefore the injunction was properly issued against them. (p.350).

Note: A petition for certiorari is pending before the U.S. Supreme Court.

Southeast Warren Community School District v.
Department of Public Instruction, No. 231/63181
(Sup.Ct. Iowa, 1979), Clearinghouse #25,213

Appeal of an Iowa state district court decision (under state statute) allowed the expulsion of a special education student after an expulsion hearing is held and procedural protections applicable to regular students are met. Child's parents were notified by the superintendent of schools that he had recommended the student be expelled for his habitual violation of school rules concerning smoking. The student's mother brought an action in district court to enjoin the expulsion and also appealed to the Iowa Department of Public Instruction (D.P.I.) pursuant to §281.6(1) of the Code which provides in part that, "A child, or his parent or guardian, or the school district in which the child resides, may obtain a review of any action or omission of state or local authorities. . .on the ground that the child has been or is about to be denied entry or continuance in a program of special education appropriate to his condition and needs." D.P.I. issued a declaratory ruling that the school district was precluded from expelling a special education student. The school district therefore filed a petition for review in district court pursuant to §17A.19(1) which provides "[a] person who had exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter." After issuing a temporary injunction, on a hearing on the merits, the district court ruled for the school disrtict and D.P.I. now brings this appeal. Rulings (modifying and affirming): (1) The child's mother had a right to bring the appeal under 281.6(1) as "she believed the scheduling of the hearing under regular expulsion procedures threatened [her son's] right to continue in the special education program and this belief was not unreasonable." A parent does not need to wait until her child is actually expelled before bringing her appeal. (p.4) (2) The school district has standing to seek judicial review of D.P.I.'s decision. The question raised by the petition concerns the nature and extent of the school district's statutory powers rather than seeking a reversal of D.P.I.'s decision. Thus the doctrine of administrative finality does not apply and the plaintiffs can be considered as falling within the meaning of "specifically and injuriously affected by the [D.P.I.] decision." (p.7) (3) While this case is moot since Thomas no longer attends the Southeast Warren Community Secondary School, it falls within the public interest exception to the rule against deciding moot cases. Pursuant to Board of Directors v. Green, 147 N.W.2d 854 (1967) a case is an exception if it "falls within that important area involving the administration, operation, management and control of our public school system." Id. at 857. (p.8) (4) Pursuant to §282.3(1) the school district has the right to refuse admission to any child whose presence in school may be injurious to the health, or morals of other pupils or to the welfare of the school. This extends to children in need of special education as well. Therefore, "[h]aving thus given the district the power to deny admission to special education students in some circumstances, it is unreasonable to believe the legislature intended to take away the right to expel them. . ." (p.11) (5) The power to expel on the grounds of 'violation of the regulations or rules established by the board' and 'when presence of the scholar is detrimental to the best interests of the school' includes the power to expel a special education student (distinguishing Stuart v. Nappi, 443 F.Supp. 1235).(p.12) (6) However, expulsion of a special education student requires special procedures before expulsion may occur. These procedures include "re-evaluation of the child by the diagnostic-education team provided for in 670 Iowa Admin. Code §12.19, a report and recommendation by that team to the board, and after full hearing, determination by the school board whether an alternative placement will meet the needs of the child and the district. Expulsion should be resorted to only when no reasonable alternative placement is available." (p.13)

Note: The court's opinion does not fully address federal statutory claims.

Stuart v. Nappi, C.A. No. B-77-381, D.Conn., Ruling, 1/4/78
(Clearinghouse #23,220D)

Action seeking to enjoin expulsion hearing for high school student enrolled in Danbury High School. Plaintiff relies on federal and state special education laws. Plaintiff was first referred for a special education evaluation in 1975. Thereafter, while plaintiff received some services, and her situation was reassessed periodically, there were delays and other problems. "[T]he school authorities were on notice in the early part of September [1977] that the program prescribed by the [evaluation team] in March of 1977 was not being administered." Plaintiff received a 10-day suspension for participation in "school-wide disturbances" which erupted in September, 1977. The school superintendent then sought her expulsion for the remainder of the 1977-78 term. Plaintiff secured a TRO, later extended, enjoining the conducting of the expulsion hearing. Rulings (in granting a preliminary injunction): (1) Plaintiff has established "a very real possibility of irreparable injury" and "probable success on the merits of four federal claims." (pp. 8-9, footnote omitted) (2) "The record before this Court suggests that plaintiff has not been provided with an appropriate education. Evidence has been introduced which shows that Danbury High School not only failed to provide plaintiff with the special education program recommended by the PPT in March of 1977, but that the high school neglected to respond adequately when it learned plaintiff was no longer participating in the special education program it had provided." (p. 8) (3) "There is no indication in either the regulations or the comments thereto [under the Education of the Handicapped Act, 20 U.S.C. §1401 et seq., 45 C.F.R §121a] that schools should be permitted to expel a handicapped child while a special education complaint is pending." (p. 10, explanation added) "[S]chool authorities can deal with emergencies by suspending handicapped children." (p. 10) (4) "The right to education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children." (p. 11) (5) "The Handicapped Act prescribes a procedure whereby disruptive children are transferred to more restrictive placements when their behavior significantly impairs the education of other children....After considerable reflection the Court is persuaded that any changes in plaintiff's placement must be made by a[n] [evaluation team] after considering the range of available placements and plaintiff's particular needs." (p. 12) (6) "Handicapped children are neither immune from a school's disciplinary process nor are they entitled to participate in programs when their behavior impairs the education of other children in the program. First, school authorities can take swift disciplinary measures, such as suspension, against disruptive handicapped children. Secondly, a PPT can request a change in the placement of handicapped children who have demonstrated that their present placement is inappropriate by disrupting the education of other children. The Handicapped Act thereby affords schools with both short-term and long-term methods of dealing with handicapped children who are behavioral problems." (p. 13) (7) The court "decline[s] to exercise its discretionary, pendent jurisdiction..." over plaintiff's state claim "[u]ntil such time as a state court has clarified the meaning..." of the state statute involved. (n.3)

See Benskin §62; Howard S. §140C.2; P-1 §140C.2; Boxall §140D; Grynes §140D; Victoria L. §140E; Harris §140F.1; Luis R. §140F.1; Bobbi J. §175C.

140C.5 Right to Year-Round Schooling

Armstrong v. Kline, 476 F.Supp. 583 (E.D.Pa. 1979) 3 EHLR 551:195, Clearinghouse #23,497

Class action challenging refusal of state and local agencies to afford free year-round residential and day special education to severely retarded and seriously emotionally disturbed students. Action brought under P.L. 94-142, 20 U.S.C. §§1401 et seq., §504 of the Rehabilitation Act, 29 U.S.C. §794, and the Equal Protection and Due Process Clauses. Rulings (in granting injunctive relief): (1) Substantial interruptions in programming for the plaintiff class results in significant loss of skills and development due, at least in part, to the absence of programming over the break. (p.593) (2) The loss of skills and development which occurs during breaks in programming is the result of the absence of educational programming render it impossible or unlikely that those students will attain the level of self-sufficiency that would otherwise reasonably be expected to reach. (p.597) (4) The decision about whether an individual student needs greater than 180 days per year of special education must be made on an individual basis for each student. (p.600) (5) State defendants' rule prohibiting provision of free educational services for more than 180 days (the length of the regular school year) precludes plaintiffs from "receiving an education that is likely to allow them to reach their reasonably set educational goals with respect to self-sufficiency." (p.600) (6) The court finds on behalf of plaintiffs under P.L. 94-142 and therefore does not have to reach the §504 or constitutional issues. (p.600) (7) Failure of plaintiffs to exhaust administrative remedies under P.L. 94-142 does not bar the action since exhaustion would have been futile due to the state rule against programming in excess of 180 days. (pp.601-02). (8) Legislative history for P.L. 94-142 indicates that exhaustion should not be required where it would be futile. (p.602) (9) The legislative history of P.L. 94-142 indicates a "strongly expressed concern for securing through education the handicapped child's achievement of self sufficiency. . .as a goal of an appropriate education" as guaranteed in that statute. (p.604) (10) This right to appropriate education does not include the right of every handicapped student to reach his or her maximum potential in every respect but does provide that education should leave each handicapped child, upon completion of school, as indepedent as possible within the limits of the handicapping condition. (p.604) (11) Given that certain handicapped students require in excess of 180 days of schooling to achieve maximum self-sufficiency, a rule against schooling in excess of 180 days denies the right to appropriate education guaranteed by P.L. 94-142. (p.605) (12) The fact that the rule against 180 day programs applies equally to non-handicapped students is not the test for determining whether appropriate education is available since P.L. 94-142 requires many services for handicapped students that are not available to the non-handicapped. (p.605) (13) All parties are to submit proposed plans for relief to the court. (p.605)

Armstrong v. Kline, Civil No. 79-2158 (3rd Cir. 7/15/80)

Appeal from district court ruling (476 F.Supp. 583 (E.D.Pa. 1979)) that Pennsylvania administrative policy, which limits to 180 days the instruction which handicapped children may receive, violates P.L. 94-142 (20 U.S.C. §§1401 *et seq*.). Rulings (in affirming and remanding for further orders): (1) P.L. 94-142 "represents an atttempt by Congress to assist the states in meeting the burdens imposed upon them by the widespread judicial recognition of the right of handicapped children to a free public education appropriate to their needs." (p.8) (2) "By focusing on [P.L. 94-142] as providing a particular educational goal, the district court erred. Rather, the Act contemplates that in the first instance each state shall have the responsibility of setting individual educational goals and reasonable means to attain these goals. The Act, however, imposes strict procedural requirements to insure the proper formulation of a free appropriate public education. We conclude that the 180 day rule precludes the proper determination of the content of a free appropriate public education and, accordingly, that it violates the Act." (p.17) (3) "The Act clearly places ultimate responsibility for compliance with the Act upon the state educational agency." (p.21) (4) "The determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states." (p.22) (5) Legislative history which expresses a concern for increased self-sufficiency for the handicapped provides guidance in the formulation of educational goals. (p.23) (6) P.L. 94-142 restricts states in their determinations of educational objectives through pervasive federal oversight by the U.S. Commissioner of Education and by the explicit procedures, detailed in the Act, to assure that states will provide free appropriate public education. (p.24) (7) The "procedural safeguards [in P.L. 94-142] require individual attention to the needs of each handicapped child." (p.25) (8) "There can be little doubt that by requiring attention to 'unique needs,' the Act demands that special education be tailored to the individual." (p.25) (8) "The inflexibility of the defendants' policy of refusing to provide more than 180 days of education [is] incompatible with the Act's emphasis on the individual." (p.26) (9) Where an inflexible rule, such as the 180 day rule, has not been submitted to the federal government for its approval, that rule must fall. (p.27) (10) One judge, *concurring*: P.L. 94-142 makes accommodation for legitimate financial concerns of the states; the class was improperly defined since it was not described in terms of a membership limited to those who suffer severe educational setbacks because of a summer vacation from schooling. (p.33) (11) One judge, *concurring and dissenting in part*: Because Congress defined the ultimate goal of P.L. 94-142 as the provision of free appropriate public education, there is no reason to defer to the states for a definition of the Congressionally established policy (p.35); there are several indications that Congress intended that maximum self-sufficiency for the handicapped is the goal of the statute. (p.38)

Matter of Frank, 414 N.Y.S.2d 851 (Family Ct., Queens County, 1979).

Action by blind children seeking an order pursuant to Family Court Act §236 against the City of New York for the cost and expenses of their special education at New York Institute for the Education of the Blind for the months of July and August, 1978. *Rulings* (in granting, in part, relief): (1) Article 89 of the Education Law limits funding of educational services for handicapped children to the traditional 10-month school year. (p.854) (2) The traditional 10-month school year construction of Article 89 of the Education Law is a binding construction of the school year for the blind and deaf child, absent a legislative enactment, incorporated within Article 85 of the Education Law setting forth a school year or "period of time the school is in session" of differing length (p.855). (3) Therefore, the period of time school is in session for the purposes of determining the state's obligation to fund said children's educational services is the traditional 10-month school year. (p.855). (4) However, the Family Court has limited jurisdiction to order education for handicapped children during the summer months; such an order is appropriate here, with the City to pay the full costs of such a program, with 50% reimbursement for such costs to come from the State.(p.855) in the provision of services (20 U.S.C. §1412(3)). (p.350). (8) Expulsion of a handicapped student is appropriate only if a qualified group of individuals determines that no relationship exists between the student's handicap and his/her misconduct. (p.350). (9) While disciplinary matters are generally a local matter, it is not solely a local issue with regard to handicapped students. Pursuant to 20 U.S.C. §1412(6), state officials were empowered to intervene in the expulsion proceddings and therefore the injunction was properly issued against them. (p.350).

Note: A petition for certiorari is pending before the U.S. Supreme Court.

Matter of George Jones, 414 N.Y.S.2d 258 (Family Court,
City of New York, Queens County, 1979).

Action by parents of a thirteen year old handicapped child, seeking an order pursuant to New York Family Court Act §236, requiring the payment of the cost of maintenance (by the appropriate governmental agency) for the child at a residential school during the summer months in 1977 and 1978. *Rulings* (in granting plaintiffs' motion): (1) Pursuant to §236, parents are not required to make a contribution to the maintenance of their child in residential placement. (p.260). (2) The New York Legislature did not intend to require parental contribution for the costs of special education placement since the legislature designed the statutes at issue here to satisfy the eligibility requirements of P.L. 94-142 (20 U.S.C. §§1401 *et seq*.) which requires that special educational services must be provided at no cost to the parents. (p.261).

Georgia Association for Retarded Citizens v. *McDaniel*,
C.A. No. C 78-1950A (N.D.Ga. 7/11/79) 3 EHLR 551:215.

Action by Georgia Association of Retarded Citizens and individual named plaintiffs seeking class certification and a preliminary injunction for defendants' failure to provide an education program and related services beyond the 180 day school year for those mentally retarded children in need of such a special education. Plaintiffs seek certification of two separate classes in this action - a class of all handicapped children of school age in Georgia who are mentally retarded and in need of special education and related services beyond the 180 day school year and a class of parents and guardians of handicapped children in Georgia who are mentally retarded and need more than 180 days of educational services. *Rulings* (in granting motion for class certification but denying motion for preliminary injunction): (1) Named plaintiffs in this action are clearly members of the class they seek to represent. (p.551:217) (2) The class is so numerous that joinder of all members is impracticable, as there are 313 profoundly or severely retarded children in Georgia who are most likely to require more than 180 days of educational services per year. (p.551:217) (3) When a class is so imprecisely defined or so indefinite that a separate adjudication is necessary to determine an individual's class membership, class certification is inappropriate. However, the administrative process used to determine which children are in need of more than 180 days of schooling with appeal to the court does not constitute separate ajudications and therefore does not foreclose class certification. (pp.551:217-18) (4) "[C]ommon questions of fact exist for each class pertaining to the defendants' alleged policy regarding more than 180 days of programming. Common questions of law include a determination of what constitutes an 'appropriate' education and whether the State or local boards are responsible for provision of extended services if they are needed to meet a handicapped child's unique needs." (p.551:218) (5) The claims of the representative party must be typical of the claims of the class. Pursuant to *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973), a class plaintiff is typical of the class if his interests do not conflict with those of the class and his claims for relief are based on the same legal or remedial theories as other class members. The representatives of each of the classes in this case meet this requirement and "state defendants' contention that the uniqueness of each individual child's training and educational requirements precludes typicality misses the point here. (p.551:218) (6) There appear to be no antagonistic interests between any of the representatives and the classes they represent. Furthermore, the named plaintiffs have demonstrated their willingness and ability to protect the interests of the class. Therefore it is held that the representatives will "fairly and adequately protect the interests of the class." (p.551: 218). (7) It is clear that plaintiff's counsel is "competent, willing and able to protect the interests of the classes here seeking certification." (p.551:218) (8) If plaintiffs' allegations are substantiated, this is clearly an action appropriate for injunctive or declaratory relief and therefore satisfies Fed.R.Civ. p.23(b)(2) (p.551:218) (9) In order to allow a grant of preliminary injunctive relief the plaintiffs must demonstrate: a substantial likelihood that plaintiffs will prevail on the merits; a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted; that the threatened injury to plaintiffs outweighs the threatened harm the injunction may do to the defendants; that the granting of a preliminary injunction will not disserve the public interest. (p.551:219)(10) Expert testimony that the skills lost over the summer months are generally recoverable within a reasonable time indicates that defendants' failure to provide more than 180 day education programming has not caused irreparable harm to plaintiffs. (p.551:219) (11) A preliminary injunction would disserve the public interest as requiring defendants to immediately structure an extended program "would greatly disrupt the defendant organizations without necessarily providing concomitant benefits to the plaintiffs." (p.551:219).

Mahoney v. Administrative School District #1,
601 P.2d 826 (Ct.App.Ore. 1979), 3 EHLR 551:535

Action by parents of a mentally retarded child seeking a determination that year-round residential placement is necessary for their mentally retarded child and that defendant school district is required to pay the year-round tuition at a private school. A hearing officer determined that the placement was appropriate and that the school district was liable for the tuition. The Department of Education, on administrative appeal, found that the placement was appropriate but the hearing officer had no authority to direct the school district to pay tuition. Plaintiffs appeal and bring their action pursuant to 94-142 (20 U.S.C. §§1401 et seq.) and ORC 343.077. Rulings: (1) "Where private residential placement had been found necessary, the tuition expense must be borne by the school district." (p.828) (2) Pursuant to the decision in Armstrong v. Kline, 476 F.Supp. 583 (E.D.Pa. 1979) the school district is liable for the payment of tuition expenses beyond the number of days in the district's regular school year. (p.828). (3) P.L. 94-142 is not merely a funding statute; the Act imposes substantive requirements on state and local systems receiving funds under it. (p.829) (4) While the Federal Act (P.L. 94-142) intended to leave the definition of "appropriate" education open to allow local legislatures and school officials to make educational decisions, "the Act plainly does not give the states and localities discretion over whether the appropriate education programs they develop are to be 'free.'" (p.829) (5) While ORC 343.077 does not expressly authorize that hearing officers may decide the issue of costs, costs are determined by the placement decision and therefore, "the hearing officer's order for payment of tuition was, at worst, surplusage." (p.830).

Rettig v. Kent City School District, et al., Civil Action No. C79-2234
Amended Complaint Class Action(N.D. Ohio, 12/13/79)

Class action brought by 14 year old autistic child against local school district and State Board of Education for failure to provide plaintiff and others similarly situated with 12-month schooling and thereby denying plaintiff and others of their right to an appropriate education. Plaintiff class is composed of all handicapped school-aged persons in Ohio who require or may require a 12-month per year program of appropriate special education and related services and the parents or guardians of such persons. Plaintiff also alleges that the evaluation instruments and procedures, educational instruction, extra-curricular activities and related services offered by defendants were inadequate to meet his unique needs. After unsuccessfully pursuing administrative hearings through the state level, plaintiff brings this action pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.), the Fourteenth Amendment; and Ohio Revised Code (§§3323.01 et seq.) seeking injunctive relief to ordering the State Board to fund and/or the local school district and its officials to provide plaintiff and the class with year-round educational programming with the necessary related services.

In the Matter of Richard G., Appeal 1011E, N.Y. Superior Ct., App.Div., 2nd Dept., 5/17/76

Appeal from a decision by Family Court which directed the City of New York to pay the "tuition" for a summer program petitioner's child attended. The child, who has been certified as physically handicapped, attended a residential school during the regular school year. During the summer months, the child lived at home and attended a special camp program. Rulings (in reversing and remanding for further findings of fact): (1) "Where the needs of the child dictate," the Family Court has the authority to order that educational services be provided during the summer as well as during the regular school year. (p. 1) (2) However, "it is not clear whether the child in question required educational services during the summer, whether the summer camp provides educational services, whether the goals set for the child in the individual treatment plan were per se educational or necessary to his education, or whether his education would have regressed had he not participated in the summer program." (p. 2)

In re Richard K., (Hooksett Dist.Ct., N.H., 6/8/79)
3 EHLR 551:192

Petition for neglect filed by New Hampshire Division of Welfare against child's mother alleging her failure to provide her child, who is in need of special education due to physical and emotional problems, with proper parental care. The Welfare Department seeks custody in order that Richard may be placed in the recommended residential placement which requires family support services which Richard's mother is unable to provide. The mother contends that the real issue is the need for special education and the school district's refusal to pay the costs for full-year residential placement as recommended by her son's I.E.P. team, out of fear that the State Board of Education will not reimburse the district for those costs. Rulings (in denying the mother's and defendants' motions to dismiss): (1) Custody is awarded to the New Hampshire Division of Welfare as Richard is found to be a neglected child without proper parental care. (p.551:193) (2) Due to his mother's failures, Richard's physical and emotional health has suffered. "The child's home life has created emotional problems that have interfered with his ability to benefit from special education while at Allenstown Elementary School." (p.551:193) (3) Richard is a handicapped child in need of year-round schooling. (p.551:193) (4) Pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.) and New Hampshire RSA 186-A, which was enacted in response to the Education of the Handicapped Act of 1970 and Section 504 of the Rehabilitation Act of 1973, the school district of Richard's residence is responsible for payment of Richard's tuition for a year-round program. (p.551:193) (5) The local school district has made an appropriate placement to a residential, year-round facility and is responsible for year-round payment of the costs for the placement. (p.551:193) (6) The State Board of Education's policy which allows for the reimbursement to local school districts for any payments for special education in excess of twice the state average per pupil cost but only if the program in question does not exceed 180 days, contravenes the duty imposed by state and federal statutes to provide for the unique individual needs of handicapped children. (p.551:194) (7) "For the State Board of Education and/or the Allenstown School District to suggest that no matter what a handicapped child's needs are found to be, publicly funded educational services of longer than 180 days a year can never be provided is rejected by this court. . .[as they are] arbitrary, capricious, plainly against the provisions and design of RSA 186-A, and void as against public policy." (p.551:194) (8) This child has special education needs that cannot be met without full-time residential placement. (p.551:194) (9) The State Board of Education, which is responsible for providing the child with free and appropriate education, under federal law, shall reimburse the local school district for tuition expenses, including summer expenses. (p.551:194) (10) The residential center in which the child is placed shall file an evaluation report with the court in 90 days; the report shall include provisions for contacts with the natural mother, who shall obtain intensive mental health counseling (about which a report is also to be made to the court).

Schnepps v. Nyquist, 396 N.Y.S.2d 275 (S.Ct., App. Div. 1977)

Parents of handicapped children attending 12 month residential educational programs appeal the Special Term's accepting the interpretation of the respondent, Commissioner of Education, that Article 89 of the Education Law requires local school districts only to assume the costs of such educational services during the ten month school year. Rulings (in modifying and affirming): (1) Such interpretation is not grounded upon an arbitrary time period, for numerous statutes recognize that instructional programs are based upon a 10-month term. Under respondent's interpretation, orders will still be required for the months of July and August. (276) (2) Respondent's interpretation of article 89 being reasonable, it is sustained. But, the Special Term, though properly converting the article 78 proceeding into a declaratory judgment action, instead of dismissing the petition, should have issued a declaration of the rights of the parties, i.e., school districts need only assume responsibility for the cost of educational services to handicapped children for the 10 month year, not July and August.

Schnepps v. Nyquist, 396 N.Y.S.2d 275 (Supreme Ct., Appellate Div., Third Dept., 1977).

Action by parents of handicapped children who attend 12-month residential educational programs seeking funding for their children's year-round schooling. Defendants allege that Article 89 of the New York Education Law only mandates that local school districts assure the cost of providing educational services for handicapped children for the 10-month period September through June, with any funding for such educational service for the months of July and August to be provided only pursuant to a Family Court Order under Section 236 of the New York Family Court Act. Rulings (in upholding and modifying order for respondent State Commissioner of Education): In construing Article 89 to limit the funding of educational services for handicapped children by local school districts to the traditional 10-month school year, it should be emphasized that respondent is not granting its interpretation upon an arbitrary time period without any basis in fact. There are numerous instances of expression of state legislative intent and statutory recognition that instructional programs are based upon a 10-month term (see §§3015, 3101, 3204, 3604 of New York Education Law). (pp. 275-76).

Note: Motion for Leave to Appeal Denied. 398 N.Y.S.2d 1030.

See Sherer §140C.1; Anderson §140C.2; Bryan D. §140C.2; Matter of Gano §140D; Matter of Scott K.§140D; Mark T. §140F.1; Crawford §140F.1.

140C.6 Related Services

In the Matter of the "A" Family, 602 P.2d 157 (1979)
(Supreme Ct. of Mont., 10/26/79, corrected 10/30/79)
3 EHLR 551:345

Action for school district's refusal to place handicapped child in an out-of-state residential program after the parents' independent educational evaluation of the child indicated he was in need of such services. After denial, plaintiff parents requested a due process hearing naming both the school district and the state Superintendent of Public Instruction as parties. (The county hearing officer dismissed the Superintendent as a party). Both county and state hearing officers determined the child to be severely emotionally disturbed (schizophrenic) and recommended residential placement; educational officials contend the student is mildly mentally retarded and could be educated in the local school district. The parents then filed in state district court requesting a mandatory injunction ordering implementation of the state hearing officer's decision. The district court affirmed the decision of the hearing officer requiring residential placement. The court further held that the administrative rules of procedure adopted by the Superintendent of Public Instruction (which allowed the superintendent to review recommendations for out-of-state placements in effect) created a dual hearing procedure in which a parent must proceed against the Superintendent violated 20 U.S.C. §1415 by preventing a final decision from being made by an impartial hearing officer. The school district and state department appealed. Rulings (affirming in part and reversing in part): (1) The nature of this action is one of mandamus and therefore the standard of review is pursuant to Rule 52(a) of Mont.R.Civ.P., that the findings of fact by the district court should not be set aside unless they are clearly erroneous. (p.162) (2) Pursuant to 20 U.S.C. §1415(e)(2), the independent evaluation conducted on the child was rightfully admitted into evidence to the district court despite its hearsay nature. (p.162) (3) As child is in need of residential placement, such placement does not violate the "least restrictive environment" requirement of P.L. 94-142 and 20-7-4-1 M.C.A. (p.163) (4) The federal regulations (45 C.F.R. §121a.13(a)) requiring the provision of psychological services, including psychotherapy, to be included as "related services" override the state regulations which exclude psychotherapy (48 ARM 2.18(22), §18430(2). since state regulations (48 ARM 2.18(46)-S18750) provide "if the Special Education Rules and Regulations are in conflict with the federal requirements, then the federal requirements supersede." (pp.165-66) (5) Pursuant to 20 U.S.C. §1415(e)(1), it is evident "that it is the intent of Congress that a party having gone through the administrative hearing processes before the local agency and the Superintendent of Public Instruction shall be entitled to a final decision, subject only to court appeal. This means that once the hearing officer for the Superintendent of Public Instruction has reached his decision in favor of the A Family, under the federal statute, the Superintendent had no further right of discretion as to approval or nonapproval of the out-of-state education plan." (p.167) (6) The state superintendent is not a proper party in a court appeal from a decision of an impartial hearing officer so long as the superintendent adopts the position that she has no discretion but is bound by the decision of the court. (p.167)

Note: In the dissenting opinion it was stated that psychiatric treatment should not be included in "related services" since P.L. 94-142 allows for psychiatric therapy but does not require it. Therefore the state and federal regulations are not in conflict and the state regulation (48 ARM 2.18(22) S18430(2)) which states that psychiatric therapy should not be included in the special education costs, controls. (p.170)

Alley v. Anne Arundel County Board of Education,
No. K-79-2211 (D.Md. 4/29/80), 4 Mental Disability Law
Reporter 179 (May/June 1980)

Action by all handicapped school-aged persons who are in need of physical and/or occupational therapy against the Anne Arundel County Board of Education for failure to provide such services. In a consent decree the parties agreed: (1) Occupational and physical therapy are included within the definition of special education and related services. (p.179) (2) The school district must have available the number of therapists needed to meet the needs of handicapped students. (p.179) (3) If the school is unable to provide a child with public services it must place the child in an appropriate private placement. (p.179) (4) The county defendants are responsible for attorneys' fees. (p. 179)

Casement v. Douglas County School District REI, C.A. No. 4935,
Judgment (Douglas County, Colo.Dist. Ct. 10/25/79)

Action by parents of severely handicapped children residing in defendant school district for defendants' failure to pay the cost of their transportation to educational programs outside of the school district. Defendants agreed that they did not have the appropriate educational facilities for the children in question. Defendants offered to pay plaintiffs 12 cents per mile to transport their children from their homes to the nearest bus (the suburban bus, which was 11-23 miles from plaintiffs' homes) which would then transport the children to their respective schools. Plaintiffs seek to have defendants either provide transportation for the children from the school bus stop nearest their home to the suburban bus stop or pay them a sufficient sum in order that plaintiffs can hire transportation to transfer the children to the suburban bus stop. Action brought pursuant to the Handicapped Children's Education Act 1973 CRS 22-20-107, the Public School Finance Act of 1973 22-50-101.5 1973 CRS, Section 504 of the Rehabilitation Act of 1973, and the Federal Impact Aid Act 20 U.S.C. §236 et seq. Rulings (in favor of plaintiffs): (1) As indicated by the (state) Handicapped Children's Education Act (1973 CRS 22-20-107) and the Public School Finance Act of 1973 (22-50-61.5 1973 CRS) the intent of the general assembly is that "the costs of school districts in the education of non-handicapped school children and handicapped school children shall be funded on the same basis including the costs of transportation of said children." (p.12) (2) "A school board policy which discriminates against plaintiffs' children is a denial of the equal protection of the law under the Fourteenth Amendment, unless there exists a compelling state interest which justifies that discrimination." (p.13). (3) The school board's policy that it would be too costly to maintain two school buses to transport plaintiffs' children is not supported by a compelling state interest. (p.13) (4) Plaintiffs' claims under §504 of the Rehabilitation Act (29 U.S.C. §794) should be resolved in the federal courts. (p.14) (5) Defendants have provided full transportation services during the current school year; this does not moot the case. An exception to the mootness doctrine is "an issue that is one of great public importance and involves constitutional rights. . .an issue that involves the right of handicapped school children, presently in attendance at the elementary and secondary levels, to equal protection of the law is not moot. (pp.14-15). (6) Defendants' policy which "denies plaintiffs' handicapped children the same school bus transportation that is provided to non-handicapped children residing within the school district, is hereby declared to be a denial of equal protection of the law. . ." (p.15)

Dady v. School Board for the City of Rochester,
282 N.W.2d 328 (Ct.App. Mich. 1979)

Action by handicapped child against school district for failure to provide her with catheterization services. Plaintiff alleges that she will lose her right to an education if she is not provided this service. Plaintiff seeks injunctive relief pursuant to the Michigan Handicappers' Civil Rights Act (M.C.L. §37.1101 et seq.; M.S.A. §3.550(101) et seq.) which provides in pertinent part "The opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accomodation, public services, and educational facilities without discrimination because of a handicap is guaranteed by this act and is a civil right." Plaintiff alleges she is being discriminated against

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as she will not have full utilization of her education program if she is not provided with catheterization services. Defendants allege that the statute imposes no affirmative duty to assist plaintiff in coping with her special needs. The trial court ruled on behalf of defendants. Rulings (in affirming): (1) "If plaintiff's interpretation of the statutory language is correct, pleas of public accommodation would also have to provide affirmative services. Such an interpretation would involve the judiciary in a course of plainly impracticable case by case assessments of the relative rights and burdens of plaintiffs and owners of public facilities. . ." (p.330) (2) Pursuant to M.C.L. 38.1178; M.S.A. §15.41178 a school administrator or teacher may only administer medication to a student "'in the presence of another adult pursuant to written permission of the pupil's parents or guardian and in compliance with the instructions of a physician.'. . . We cannot assume that the legislature meant to extend, by implication only, a school district's duty to provide medical services when it has been so careful to restrict that authority explicitly by statute." (p.331) (3) It is the parents' responsibility to provide medical procedures for their child. (p.331) (4) The Michigan Civil Rights Act provides no more protection to the handicapped than to one who may be discriminated against due to religion, race, color, national origin or sex. (p.331) (5) Plaintiff's attention is directed to other Michigan statutes which may place affirmative duties to accomodate the handicapped and which might afford relief. Plaintiff however only brought this act under the Handicapper's Civil Rights Act. (p.331) (6) HRCA does not apply when one is unable to utilize a school because of a handicap, but rather when one's handicap is "'unrelated to the individual's ability to utilize and benefit from the institution or its services.'" (p.332)

Department of Education,"Notice of Interpretation on Catheterization,"46 Fed.Reg. 4912 (January 19, 1981).

The Secretary of Education has issued an interpretation that, under both P.L. 94-142 and Section 504, public educational agencies are required to provide clean intermittent catheterization ("CIC) as a "related service" to handicapped children when it is required in order to provide a free appropriate public education, including education in the least restrictive environment. The Secretary indiciates that while catheterization is not specifically listed as a related service at 34 C.F.R. §300.13, the comment following that section states that the list of related services is not exhaustive and may include other services if they are required to assist a handicapped child to benefit from special education. Catheterization is such a service. The notice further clarifies that a public agency is not required to provide CIC to a child who is enrolled in a day program when the child is not in school, nor is the agency required to provide routine medical services, such as laboratory analysis, that may be related to the provision of CIC.

Note: The Reagan Administration has this policy interpretation under review. See 46 Fed.Reg. 19001 (March 27, 1981).

Gary B. v. Cronin, No. 79C 5383, N.D. Ill., Memorandum Opinion and Order, 6/10/80

Action by emotionally disturbed children who allege that they must attend private schools because the Illinois public schools, pursuant to state rule, have failed to provide counseling or therapeutic services as related services or as part of their special education program. Plaintiffs allege that failure to provide these services violate P.L. 94-142 (20 U.S.C. §§1401-1461) and the regulations promulgated thereunder, Section 504 of the Rehabilitation Act of 1973 and its regulations, the Due Process and Equal Protection Clauses of the United States Constitution, Article X of the Illinois Constitution and Article XIV of the Illinois School Code, Ill.Rev.Stat. ch.122 §14-1:01 to 14.01. Defendants (state education officials) in moving to dismiss argue that: plaintiffs do not have standing, the court does not have subject matter jurisdiction, plaintiffs have not stated claims for which relief may be granted, plaintiffs have failed to exhaust administrative remedies, this is an appropriate case for abstention and the Department of Education is an indispensable party whose absence requires dismissal. Rulings (in granting in part and denying in part defendants' motion to dismiss): (1) The case is unlike Windward School v. New York, 551 Educ. Handicapped L. Rep. 221 (S.D.N.Y. 1978) in which the plaintiffs did not have standing to bring an action to enjoin New York from disapproving the school in question as a publicly-funded education facility since approving a school for public funding is purely a state matter. In this case Illinois private schools are allegedly not providing any counseling and therapeutic services as related services, thereby causing plaintiffs to be denied services totally or to incur the costs themselves. Therefore plaintiffs have standing as they have a personal stake in the outcome of the controversy. (pp. 3-4) (2) This court has jurisdiction pursuant to 28 U.S.C. §1331(a) and 28 U.S.C. §1343, as plaintiffs have raised a substantial federal question, i.e., whether Illinois is complying with P.L. 94-142, Section 504 and the Constitution; the cost of counseling services for plaintiffs should they prevail will exceed the $10,000 amount in controversy requirement, and this action involves an Act of Congress providing for equal rights or protecting civil rights. (pp. 5-6) (3) P.L. 94-142 is an act providing for equal rights within the meaning of §1343 as interpreted by Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). (p.8) (4) Plaintiffs have stated a claim for which relief may be granted under P.L. 94-142, Section 504, and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs, however, have not stated a claim under the Due Process Clause of the Fourteenth Amendment or the Illinois Constitution. (pp. 10-11) (5) "If counseling and therapeutic services are related services, then they are components of the free appropriate education to which plaintiffs are entitled." In alleging these are related services, plaintiffs have stated a claim under P.L. 94-142 (pp. 11-12) (6) "At first blush, H.E.W.'s authority to promulgate [its regulations under §504 on discrimination in education]. . .is called into question under Southeastern Community College v. Davis, 442 U.S. 397 (1979). (p.12) (7) A balancing test is appropriate in scrutinizing H.E.W.'s regulations under §504. For purposes of determining a motion to dismiss, the court assumes the regulations are not overly burdensome and are therefore valid and considers plaintiffs' allegations in light of the regulations. (p.16) (8) The holding in Tatro v. Texas, 481 F.Supp. 1224 (N.D.Tex. 1979) in which the court held catheterization is not a related service under H.E.W.'s regulations because it is not a prerequisite to learning, is not applicable here as plaintiffs contend that without therapeutic counseling they will not receive an appropriate education. Since their needs are allegedly not being met as adequately as nonhandicapped students, there is a sufficient claim of discrimination to allow for standing under Section 504 (pp. 17-18). (9) In alleging that the Illinois Public School's policy of failing to provide counseling and therapeutic services deprives plaintiffs of a free appropriate education but does not effect nonhandicapped children, the plaintiffs have stated a claim for relief pursuant to the Equal Protection Clause of the Fourteenth Amendment. (pp. 20-21) (10) Plaintiffs have not stated a claim for which relief can be granted under the Due Process Clause of the Fourteenth Amendment as "to assert that the state must provide notice and a hearing to all students who receive certain services before terminating those services expands the Due Process Clause further than it was intended." (p.22) (11) Plaintiffs have not stated a claim for which relief can be granted under Article X of the Illinois constitution, which mandates only that the state provide a tuition free education. "No cases have been uncovered which indicate that a tuition-free education under Article X includes the provision of counseling services." (p.22) (12) "If an exhaustion attempt would be futile, the complaint [under P.L. 94-142] need not be dismissed for failure to exhaust administrative remedies." (citing Armstrong v. Kline, 476 F.Supp. 583, 601-2 (E.D.Pa. 1979).(p.23) (13) As Illinois has not established " a meaningful process of administrative review," plaintiffs are not required to exhaust administrative remedies under P.L. 94-142. (p.24) (14) The administrative remedy under Section 504 which provides for the cutting off of federal funds for noncompliance does not provide a "meaningful enforcement mechanism" for plaintiffs' situation and therefore failure to exhaust is excused and exhaustion is not required. (p.27) (15) Defendants urge abstention but are, in effect, asking the court to declare pendant jurisdiction. The court may excercise pendent jurisdiction over the state law claims here since state and federal claims are so closely tied. (pp. 29-30) (16) While the Department of Education (DOE) may be an indispensable party, there has been no showing that DOE could not be joined. Thus, the court has no basis on which to order dismissal for failure to join an indispensable party. (p.30)

Gary B. v. Cronin, No. 79 C 5383, Memorandum Opinion and Order (N.D.Ill., 7/17/80)

Action by emotionally disturbed children alleging denial of a free appropriate public education due to defendants' failure to provide them with counselling and therapeutic services. Plaintiffs, who are attending private residential schools, challenge Illinois State Board Rule 3.21(c) which excludes such services from being considered as part of the special education or related services which the state must provide for handicapped children. Action brought pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.), Section 504 of the Rehabilitation Act of 1973; the Equal Protection Clause; and Article XIV of the Illinois School COde, Ill.Rev.Stat. Ch.122, §§14-1.01-14.01 seeking to enjoin defendants from enforcing Rule 3.21 and failing to provide them with or reimburse them for the cost of counselling, therapy, psychological and social services. Rulings (in granting a preliminary injunction): (1) Plaintiffs have shown a reasonable likelihood of success on the merits, as defendants' failure to consider counseling and therapeutic services as related services is inconsistent with definitions in the federal law and Illinois School Code (p.3). (2) "While psychotherapy may be related to mental health, it may also be required before a child can derive any benefit from education." Therefore these services should be considered part of the child's *educational* needs and be provided at no cost to parents. (pp.4-5). (3) Plaintiffs have shown that there is no adequate remedy of law and that they will be irreparably harmed if the injunction does not issue, in that some plaintiffs have been denied adequate placement and are therefore in danger of regression and great inability to learn. In such cases legal relief is inadequate. (pp.8-9) (4) "Balancing the hardships, the court finds that the greater hardship is on the plaintiffs and their families." (p.9) (5) The public interest is best served by granting the preliminary injunction in that the cost on the state of educating a handicapped student is much less than the cost of maintaining him/her for life. (pp.9-10).

Levy v. *Wentz*, No. 71274, Circuit Court, City of St. Louis, Mo., Settlement Agreement, 3/16/78

Action on behalf of elementary school educable mentally retarded, behaviorally disabled, and learning disabled children in need of special education in the City of St. Louis who seek bus or other transportation to their special education classes. *Settlement*: (1) The school district will provide chartered bus transportation to all EMR, BD and LD students in grades kindergarten through grade eight who live more than one mile from school. (p. 2) (2) The district shall make reasonable efforts to ensure that no child should have to travel more than one-half mile to get to or from the bus pick-up point. (p. 2) (3) For EMR, LD, or BD children who live less than one mile from school, the decision about what form of transportation they will be provided will be made at the IEP meeting conducted pursuant to 20 U.S.C. §1401 and 45 C.F.R. §§121a.340 and 121a.344. (p. 3) (4) The school district is required to provide notice of the new policy to students and to implement a system of reporting to plaintiffs' counsel. (p. 4)

Mitchell v. *Board of Education of the City School District of the City of New York*, 400 N.Y.S.2d 571 (1978); 414 N.Y.S.2d 571 (Supreme Ct., App.Div., 2nd Dept., N.Y., 1979).

Action by students and private schools, pursuant to state statute, to review and annul the determination of the Board of Education altering the hours of school bus transportation for petitioner students to and from private school. The Board of Education promulgated a memo which was sent to all private schools providing for the educational needs of handicapped children. The Board memo requested that the private schools schedule their class sessions from 10:00 a.m. to 4:00 p.m., rather than from 9:00 a.m. to 3:00 p.m., in order to allow the Board of Education to utilize the same vehicles to serve the private schools as being used to serve the public schools on their regular session. The petitioner schools (private schools) would not comply with the proposed changes on a number of grounds, including the fact that children requiring special education are allegedly more receptive to learning in the morning hours and that the new schedule would work a hardship on working parents since they would have to alter their schedules to supervise their children for an additional hour in the morning. Defendants granted some school exemptions if it was found that it would be physically impossible for the school to make the transportation change. Schools which were not granted the exemption bring this action alleging breach of contract between the parties failure to provide appropriate or suitable services for handicapped children in petitioners' schools in violation of §§4401 and 4402 of the Education Law and making a determination which is arbitrary and capricious since, under the proposed revised bus schedule, the children at the petitioner schools are not provided equal transportation schedules. Rulings: (1) Although the right to an education is not guaranteed by the United States Constitution, where a state or subdivision thereof undertakes to provide a free education to all students, it must recognize an individual student's legitimate entitlements to a public education as a property interest protected by the due process clause and it must not discriminate against handicapped children. (p.926). (2) The state's interest in educating handicapped children clearly outweighs its interest in preserving its financial interests. (p.926) (3) If sufficient funds are not available to finance all of the services and programs needed in a school system, then available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. (p.926) (4) Weighing the competing factors in the proposed rescheduling of bus transportation is an administrative responsibility solely within the purview of the respondent board in the first instance. The courts should not assume the exercise of educational policy vested by constitution and statute in school administrative agencies so long as such agencies do not violate defined public policies. (p.927) (5) The criteria evolved by the respondent board to be applied as guidelines in determining which private schools should be granted exemption from the bus schedules "were fair, reasonable, objective and obviously drawn for the sole purpose of making the practical implementation of the proposed change possible and in no way to serve the purpose of discrimination." (p.927). (6) Petitioners have failed to either allege or demonstrate that respondents' selection of some private schools for the double utilization program rather than other schools was the result of clear and intentional or invidious discrimination. (p.928)

Tatro v. State of Texas, 481 F.Supp. 1224 (N.D. Tex. 1979)
3 EHLR 551:502

Action by the parents of a three and-a-half year old female child suffering from spina bifida for injunctive relief and money damages for defendants' failure to provide catheterization for their child during her school day in the school district's early childhood development program. Plaintiffs allege that the provision of catheterization services is required by P.L. 94-142 (20 U.S.C. §§1401 et seq.), and the Rehabilitation Act of 1973 (29 U.S.C. §794). Rulings (in denying plaintiffs' motion for preliminary relief and granting in part a motion to dismiss): (1) "Free and appropriate public education refers to special education and related services which meet various conditions. The services required to be provided must be related to special education. . .Provision of CIC (catheterization),unlike such listed 'related services' as 'speech pathology and audiology, psychological services, physical and occupational therapy, [and] recreation,' is not directly related to the provision of 'special education.'" (p.1227) (2) CIC is no more related to plaintiff's need for special education than her need for food and water. (p.1227) (3)"Related services" which schools must provide include only transportation and supportive services required to assist a handicapped child to benefit from special education; neither includes CIC. (p.1227) (3) Pursuant to 20 U.S.C. §1401(17) medical services which are provided must be for diagnostic and evaluation or developmental or corrective purposes only. Catheterization does not fall within these two purposes. (p.1227) (4) "The court has found no congressional intent to sweep broadly in its usage of the word "related." Instead the court finds that to be related in the statutory sense the service requirement must arise from the effort to educate." (p.1227) (5) The legislative history of P.L.94-142 indicates that related services are to be only those that make the special education being provided more beneficial and not those required to maintain life systems. (p.1227) (6) While 20 U.S.C. §1401(17) includes among related services "school health services," catheterization does not fall within this category. School health services are not only "services provided by a qualified school nurse or other qualified person" (see §121a.13(b)(10) but are those services which fall under the definition of related services. Catheterization is not such a related service. (p.1228) (7) There is no violation of Section 504. "Plaintiffs cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of government health care for people seeking to participate in such programs." (p.1229) (8) Section 504 embodies a "relatedness" requirement also. There is not a sufficient enough connection between the provision of catheterization services and the requirement of providing an equal opportunity in"nonacademic and extracurricular services" as required by 45 C.F.R. §84.37(a)(1) to require catheterization as a related service under §504. (p.1229) (8) While the school district's own policy provides for the provision of emergency life-saving services, catheterization is not an emergency service by nature. (p.1229)

Tatro v. State of Texas, 625 F.2d 557 (C.A.5,1980)
3 EHLR 552:226

Appeal of district court decision denying plaintiffs' injunctive relief and money damages for defendants' failure to provide catheterization for their child during the school day. Plaintiffs allege that the provision of catheterization services is a "related service" required by P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973. Rulings (in vacating and remanding): (1) The district court erred in its determination that all related services must arise from the effort to educate in order to fit within the statutory definition. (p.9097) (2) Since plaintiff cannot benefit from the special education to which she is entitled, for without [catheterization], she cannot be present in the classroom at all. Thus [catheterization] is a supportive service required to assist [plaintiff] to benefit from her special education." (p.9097) (3) The language of P.L. 94-142 itself provides sufficient limitations which will prevent the interpretation of the Act feared by the district court that "every necessary life support system is to be furnished." These limitations are a) that a child must be handicapped and in need of special education in order to qualify for related services; b) the life support services must be necessary to aid a handicapped child to benefit from the special education to be provided; c) the life support services in order to be a related service must be one which a nurse or other qualified person can perform. (pp.9097-8) (4) Excluded from the term "related services" are health-related activities that must be performed by a licensed physician and are provided for purposes other than diagnosis to determine the existence or nature of a handicapping condition. (p.9098) (5)"Construing the term 'related services' to exclude services like CIC [catheterization], necessary to keep a handicapped child in the classroom, would completely eviscerate [P.L. 94-142's] mandate." (p.9098) (6) In light of the "congressional judgment that handicapped children should be educated in the regular classrooms to the maximum extent appropriate, and given the existence of limitations in the statute which circumscribe the types of life support systems which must be provided as related services, we hold that the words 'supportive services. . .as may be required to assist a handicapped child to benefit from special education' must be read literally to include the provision of CIC to [plaintiff]." (pp.9098-99). (7) Plaintiffs' exclusion from the school district's preschool program due to their failure to provide catheterization service is in violation of Section 504. (p.9099) (8) This case is distinguished from Southeastern Community College v. Davis, 442 U.S. 397 (1979) in that if plaintiff is provided catheterization services she will be able to perform well in school and realize the principle benefits of the school district's program. (p.9099).

University of Texas v. Camenisch, 49 U.S.L.W. 4468
(4/28/81)

Deaf graduate student seeks to have University pay for sign-language interpreter for his classes. District Court, finding a violation of Section 504 of the Rehabilitation Act (29 U.S.C. §794), entered a preliminary injunction requiring the University to provide the interpreter. The Circuit Court affirmed, 616 F.2d 127 (5th Cir. 1980), but in the mean time the student graduated. Rulings (in vacating and remanding): (1) "The Court of Appeals correctly held that the case as a whole is not moot, since, as that court noted, it remains to be decided who should ultimately bear the cost of the interpreter. However, the issue before the Court of Appeals was not who should pay for the interpreter, but rather whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him." (p.4469) (2) "Because the only issue presently before us- the correctness of the decision to grant a preliminary injunction - is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits." (p.4469) (3) "Where a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy. Thus when the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits. Where, by contrast, a federal district court has granted a permanent injunction, the parties will already have had their trial on the merits, and, even if the case would otherwise be moot, a determination can be had on appeal of the correctness of the trial court's decision on the merits, since the case has been saved from mootness by the injunction bond. (p.4470) (4) Burger, concurring: "The trial court must, among other things, decide whether the federal regulations at issue, which go beyond the carefully worded nondiscrimination provision of §504, exceed the powers of the Department of Health and Human Services under §504. The Secretary has no authority to rewrite the statutory scheme by means of regulations." (p.4471)

Matter of Young, 377 N.Y.S.2d 429 (Family Ct., St. Lawrence Cty., 1975)

Petition for payment of transportation costs for a physically handicapped child. Total transportation costs requested are $10,221 or $56.78 per day for a 60-mile-a-day round trip to a school outside his community. The county objects on the ground that the child, having an IQ of less than 50, is so retarded that he cannot benefit from an educational program. Pursuant to state regulations, a school district committee on the handicapped determined that the child should continue in school. Ruling (in denying the county's objections): The testimony adduced at the hearing clearly supports the committee's decision. "There is substantial evidence that the child has benefitted from the educational program and can be expected to benefit in the future." The committee did not abuse its discretionary power and its decision should not be overruled. (430)

See Allen §;40C.2; Anderson §140C.2; Kent §140C.2; Rowley §140C.2; Tatro §140C.6; Mattie T. §140B; Lopez §140C.2; Barnes §140F.3.

140D. Payment of Costs for Special Education

Amherst-Pelham Regional School Committee v. Department of Education, 381 N.E.2d 922 (Supreme Jud.Ct., Mass., 1978)

Action concerning appropriate placment of student with severe learning disabilities. Student was removed from public school by parents and placed in private school prior to initiation of state or federal statutes guaranteeing an education for handicapped students. When the stated statute (Chapter 766) was enacted, the family applied for special education services from the district, but ultimately rejected these services as inappropriate and applied for tuition reimbursement. The matter was pursued through an administrative hearing which found the private placement to be appropriate and ordered tuition reimbursement back to the date the family initially rejected the district's proposed placement. The district then commenced this action. Rulings: (1) Under state law, the state bureau of special education administrative appeals may recommend a specific alternative placement for a student and, once the bureau has found the district's proposal inadequate, there is no further requirement for school committee input in the decision-making process and the district must provide the required program without unnecessary delay. (p.928) (2) "Parents who have provided necessary services at their own expense are entitled to retroactive reimbursement from the date at which they rejected the school committee's inadequate plan where, as in the instant case, the parents' plan is subsequently approved." (p.933) (3) The school district has failed to demonstrate that any of its procedural rights were violated in the administrative hearing process. (p.933).

Board of Education of the Town of Manchester v.
Connecticut State Board of Education,(Sup.Ct. of
Conn. 2/26/80) 3 EHLR 551:556

Appeal by school district from lower court's dismissal of district's appeal of state board ruling that district was responsible for all reasonable costs, including transportation costs, for a multi-handicapped student placed in a private institution by his parents. While the student's parents awaited the outcome of a state administrative review of their complaint concerning the appropriateness of his educational programming, they placed him in a private school. The state board of education later concluded that the local district's proposed program was inappropriate and that the private placement implemented by the parents was appropriate and the local district should pay all costs for that program. The school district appealed to the state court on the grounds that the state board of education has no authority under state statute to order the local district to pay the costs of private placement and that the parents' unilateral placement of the student into a private program precluded reimbursement. Rulings (in affirming): (1) Under Connecticut statute, the state board of education is ultimately responsible for ensuring that students in need of special education receive appropriate education. (pp. 551:557-58) (2) A state order affirming the appropriateness of the private placement and requiring reimbursement "must be viewed as a prescription of an alternate special education program" under state statute. (p.551:558) (3) Unilateral action by a parent in placing a child in a private school does not obligate a local school district to reimburse the parents pursuant to §10-76d, Conn.Stat. However,here, placement in a private school by the parents was not unilateral action barring reimbursement since the parents had exhausted every other remedy available to them. Given the eventual state finding of the appropriateness of the private placement, the manner in which that placement occurred is immaterial. (p.551:559)

Boxall v. Sequoia Union High School District, 464 F.Supp.
1104 (N.D. Cal. 1979)

Action brought by 16 year-old autistic child and his father for injunctive relief and damages for alleged failure of school district to provide child with a free public education appropriate to his needs by refusing to pay for full time private tutor for child in home of parents. After due process hearing and educational assessment it was determined child was in need of a home tutor six hours a day, but the school refused to pay for more than one hour a day. A state-level administrative hearing was held, but no decision was ever issued. Plaintiffs seek injunctive relief to require school district to provide free appropriate public education and damages in order to reimburse parents for cost of privately acquired tutor pursuant to 42 U.S.C. §1983, §504 of the Rehabilitation Act of 1973, and P.L. 94-142, the Education for All Handicapped Children Act. Rulings (in denying defendants' motion to dismiss): (1) Section 504 of the Rehabilitation Act of 1973 is analogous to Title VI of the Civil Rights Act of 1964; its regulations, 45 C.F.R. Part 84, though effective June 3, 1977, can be applied to conduct prior to their effective date, given that they merely interpret the statute. (1108, n.3) Section 504 and P.L. 94-142, 20 U.S.C. §§1401 et seq. and its regulations, 45 C.F.R. Part 121a, provide the handicapped with a formidable array of federal rights, both procedural and substantive. (1108) (2) A private cause of action does exist to enforce the provisions of §504 and its regulations; legislative history of the Act and the analogy to Title VI of the Civil Rights Act of 1964 support the existence of such a right. (1109) (3) The school district's failure to provide an autistic child a free appropriate public education by refusing to pay for a full-time home tutor is subject to judicial review through a private cause of action. (1110) (4) Normally, exhaustion of administrative remedies is required before pursuing a private action under §504. (1110) (5) A significant overlap exists between §504 of the Rehabilitation Act and P.L. 94-142, the Education for All Handicapped Children Act. Plaintiffs have complied with the latter's administrative requirements for review under 20 U.S.C. §1415; and 20 U.S.C. §1415(e) provides a right to sue in federal district courts to review adverse determinations resulting from the hearing process. (1111) (6) Plaintiffs cannot be expected to exhaust §504 administrative remedies in seeking to enforce a right that stems from both statutes. Such an aggrieved person need not do more than exhaust the administrative remedies created under P.L. 94-142. (1111) (7) "There is a right to sue in the federal district courts to review adverse determinations resulting from the hearing process." (20 U.S.C. §1415(e)). (p.1111) (8) "Title VI and the Rehabilitation Act should probably be seen as creating a private supplement to government enforcement, not as providing a new entitlement to damages." (p.1112) (9) The court does have authority under P.L. 94-142 to award damages but only compensatory damages, not punitive damages. (p.1112) (10) Since plaintiffs are also seeking damages under 42 U.S.C. §1983, the court does not have to determine the question as to whether damages can be sought for the actions beginning in September 1976 (P.L. 94-142 only became effective in October 1977). (p.1113) (11) Plaintiffs may bring a claim under Section 1983 in that they "allege violations of the Fourteenth Amendment due process clause because of a failure to provide notice and a hearing prior to the decision in 1976 to change David's educational situation." (p.1113) (12) Plaintiffs have complied with California Tort Claims Act in that since the County's liability stems from its contractual relations with the school district plaintiffs can take advantage of Cal.Gov't Code §895.2 and need not present the claims to the county within 100 days of the accrual of the cause of action. (as required by Cal. Gov't Code §§905, 911.2). (p.1113)

Note: The court seems to be indicating that a violation of Section 504 may create a challenge based on §1983. This would indicate that it may be possible to get damages under §504 by bringing an action under 42 U.S.C. §1983.

Campbell v. Kruse, Appeal No. 76-1704, U.S. Supreme Court, October Term, 1977 (Bulletin, p. 423)

Appeal was filed with the Supreme Court in this case in which the district court invalidated on equal protection grounds Virginia's system of partial tuition reimbursements for handicapped children. Questions presented for review: "(1) Does state, upon enactment of tuition assistance program providing grants of up to $5,000 to enable handicapped pupils for whom no appropriate public school program is available to attend public schools, thereby become obligated to pay all costs in excess of grants limits for those pupils who lack financial resources to pay excess costs? (2) Did court below err in ordering state to provide requested funding? (3) Are handicapped children whose families cannot afford to supplement grants entitled to supplemental funding under Rehabilitation Act of 1973 or Education of All Handicapped Act of 1975? (4) Did court below err in its finding that Virginia scheme of aid to handicapped pupils discriminated against handicapped children whose families cannot afford to supplement grants?"

Cook v. Commonwealth Bureau of Vocational Rehabilitation of Labor and Industry, 405 A.2d 1000 (Commonwealth Ct. of Pa., 1979)

Action by handicapped law student appealing an order by the Bureau of Vocational Rehabilitation of the Department of Labor and Industry (BVR) which denied him vocational rehabilitation assistance while he was enrolled in law school. Petitioner, a hemophiliac, received educational rehabilitative support while in undergraduate school. Upon entry into law school, petitioner's request for assistance was denied by BVR on the grounds that he was employable within the terms of the Rehabilitative Act of 1973 (29 U.S.C. §794) and therefore not in need of further training. After a series of administrative reviews, petitioner brings this action alleging denial of his rights under Section 504 of the Rehabilitation Act of 1973, the Pennsylvania Rehabilitation Act (43 P.S. §681.1 et seq.) and the Equal Protection Clause of the Pennsylvania Constitution and the 14th Amendment (since a similarly situated individual was granted such benefits by the Office of the Visually Handicapped). Rulings (in reversing and remanding the order of BVR): (1) The standard for providing rehabilitation services is whether further vocational rehabilitative services can reasonably be expected to benefit a handicapped individual in terms of employability consistent with his/her capacities and abilities. (p.1003). (2) "Petitioner is entitled to assistance for his law school education if he meets the eligibility requirements of the Rehabilitation Act of 1973" (see 45 C.F.R. §1361.1(f)).(p.1006) (3) Due to the unavailability of an individualized written rehabilitation plan as required by Section 101 of the Rehabilitation Act of 1973 there is insufficient proof to settle the issue of whether the petitioner was eligible for rehabilitation assistance for law school. Since accurate records were not kept as required by the Administrative Agency Law (AAL) (71 P.S. §1701.1. et seq.), the case is remanded for a fair hearing conducted in compliance with the AAL (p.1005). (4) Under §504 and its implementing regulations, "rehabilitative services may be denied only upon a determination beyond any reasonable doubt that the individual is ineligible for such services because the individual has no mental or physical disability constituting a substantial handicap to employment or because it has been determined beyond any reasonable doubt that the individual cannot be expected to benefit in terms of employability from vocational rehabilitation services [emphasis in original]. (p.1005) (5) The challenge under the Pennsylvania Rehabilitation Act shall be decided by reference to the Rehabilitation Act of 1973. (p.1006) (6) Since petitioner will receive assistance under the Rehabilitation Act of 1973 if eligible, there is no need to reach petitioner's equal protection argument. (p.1006).

In the Matter of Charles M., 420 N.Y.S.2d 173 (1979)

Petition by the father of a child suffering from Down's syndrome seeking reimbursement for tuition and maintenance of his child at the Woods School for July and August 1977. Action brought pursuant furthermore, the Sept. 1, 1978 date for compliance has not yet arrived. (p.408) (8) Provisions of §504 of the Rehabilitation Act and its implementing regulations (45 C.F.R. §84.33) are not applicable here since the residential placement is not for the purpose of providing education. (p.408) (9) Even if plaintiff's §504 and P.L. 94-142 claims were valid, the present proceeding would not be the appropriate forum since the relief would be loss of federal funds to the state rather than a right to a monetary set-off for plaintiff in a state court proceeding. (p.408) (10) The state statutory classification of the handicapped does not create a suspect class within the meaning of equal protection. (p.409) (11) While there is some point to plaintiff's argument that children in the state school for the mentally retarded are not receiving treatment equal to that afforded students in ordinary schools, since the educational role of state schools is of much less importance than their custodial role, there is no real comparison between the two types of schools and equal protection does not apply. (p.410) (12) There are, however, significant equal protection problems presented by the disparate treatment afforded to severely and profoundly retarded students assigned to day treatment centers, where there is no charge for services, as opposed to those assigned to state residential schools, where costs are assessed. (p.411) (13) Since all educational costs are paid for day treatment students, residential school students are entitled to a credit for their costs equal to the value of the education provided to day treatment students; "Once the state decide[d] to supply $5500 worth of care to severely and profoundly retarded children in day care centers without charging any affected child for that care, regardless of the financial means of that parent, then all parents of severely and profoundly retarded children are entitled to $5,500 worth of comparable care, without paying for it, and regardless of financial ability to pay." (p. 412-13)

Chatterton v. Lincoln County School District, Civil No.
78-346 (D.Ore. 11/13/79) 3 EHLR 551:548

Action by parents of a mentally retarded twelve year-old boy for defendant school district's failure to pay for the educational costs for placement of their child at a private care facility. Defendant alleges that it is able to provide David with an appropriate special education and related services and therefore is not responsible for the cost of his private school placement. The results of two due process hearings (the most recent before the Oregon Department of Education), indicate that defendant school district had made available a free appropriate public education for David but plaintiffs rejected the proposed program. After these hearings, plaintiffs bring this appeal pursuant to 20 U.S.C. §1415(e). Rulings (in granting defendants' motion for summary judgment): (1) Pursuant to 45 C.F.R. §121a.403, a public agency is not required to pay for a child's private school placement if a free appropriate public education has been made available for the child in the local school district. (p.551:549) (2) However, "if the local agency refers the child to a private facility, the district must pay all costs, including room and board. If the parents choose the private placement, the school district is relieved of financial responsibility."(p.551:550). (3) There is no evidence to indicate that the hearing officers were wrong in their determination that defendant school district was able to provide David with a free appropriate public education. Therefore, defendants are not required to pay the costs of his private school placement. (p.551:550). (4) Congress did not intend that "the school district must pay the tuition costs for handicapped children already residing in care facilities for which there is no comparable local care, regardless of whether they were placed there because of parental preference or school referral." While such a policy would ease the financial burden on parents who feel their children are in need of custodial care outside the school day, that is not the purpose of P.L. 94-142. (p.551:550) (5) "The school district's only obligation under the Act and regulation is to make available a free appropriate public education. The district need not provide suitable living arrangements or custodial care outside the school day." (p.551:550)

Denver Association for Retarded Children v. School District No. 1 in City and County of Denver, 535 P.2d 200 (Colo.S.Ct., 1975)

Appeals from district court order compelling the school district to comply with a statute relating to payments for mentally retarded and handicapped persons. Under the statute, school districts which did not choose to provide their own program for mentally retarded and seriously handicapped persons were required to provide to a community board the amount raised per pupil in "average daily attendance entitlement." See 1971 Perm. Supp., C.R.S. 1963, 71-8-2(3). School District No. 1 did not make full payments, claiming that the statute was unconstitutional. Rulings (affirming in part and reversing in part): (1) Under Colorado law, the officials of a political subdivision of the state lack standing to challenge the constitutionality of a statute directing their performance. (204) That rule is not subject to exception in a case where the statute prescribes a duty to be performed by a ministerial or executive officer. (204) (2) Kindergarten is included within the meaning of "regular school program," and the district is obligated to pay for the education of those who, but for their retardation or handicap, would attend the system's kindergarten. (205) (3) "[A] clear right in the Board to demand performance, and a clear legal duty on the defendants to act, makes this a proper case for disposition by mandamus." (205) (4) There was no basis for an award of attorney fees. (205-206)

Department of Social Services v. Ryder, 425 N.Y.S.2d 944 (Family Ct., Rockland Cty., 1980)

Action by the Commissioner of Social Services claiming contribution against the parents of a handicapped child (Claudia) for the cost and maintenance of their child in foster care. Claudia was placed in a group home after coming under the jurisdiction of the commissioner of social services following a voluntary surrender of custody by her parents. The local school district has determined Claudia to be a handicapped child. While in residential placement at the group home, she is receiving special education from the Board of Cooperative Education. The Commissioner seeks contribution for the cost and maintenance while at the group home. Ruling (in dismissing the action as a matter of law): While the Social Services Law §§101 and 104 require a parent to contribute to the expenses of a child in foster care, the rule is otherwise where the residential placement is made under §§4405 of the Education Law. The charge in this instance would be upon the governmental agencies and not upon the parent. (p.944).

Department of Education,"Notice of Interpretation on Insurance Proceeds,"45 *Fed.Reg*. 86390 (Dec. 30, 1980)

The Secretary of Education has issued a notice of interpretation concerning whether an educational agency responsible for the education of a handicapped child can require the child's parents to file insurance claims and use the proceeds to pay for services that must be provided to the child. The Secretary has interpreted the requirement that a free appropriate public education for handicapped children be provided *without cost* to the parents of those children to mean that an agency may not compel parents to file an insurance claim when filing "would pose a realistic threat that the parents of handicapped children would suffer a financial loss not incurred by similarly situated parents of non-handicapped children." Financial losses include a decrease in available lifetime coverage or other benefits under an insurance policy, an increase in premiums or the payment of a deductible amount. Incidental costs such as the postage needed to mail the claim, however, are not considered financial losses.

Note: The Reagan Administration has this policy interpretation under review. See 46 *Fed.Reg*. 19001 (March 27, 1981).

Doe v. *Colburg*, 555 P.2d 753 (S.Ct., Mont., 1976)

Appeal from order requiring state superintendent of public instruction to provide special education funds to serve an emotionally disturbed high school student. Plaintiff's guardian had learned of a behavioral modification program in Colorado and received school board approval to use funds to have plaintiff treated there. The initial cost for the "psychiatric-medical treatment" was determined to be $2,500 plus costs for follow-up supportive services of unknown amounts. The superintendent rejected the request as an improper expenditure of

Dubner v. *Ambach*, Motion No. 55 (Sup.Ct., Albany County, N.Y., 1/12/79, as amended 2/20/79, 3/9/79, 5/25/79) 3 EHLR 551:281

Action by parents of hearing impaired student who placed their child in a public school outside their state of residence in order that he receive an appropriate educational program. The placement was sought by plaintiff's local school district,but the state department of education refused to pay the costs of an out-of-state placement in a public school. Plaintiffs sought an order requiring the state to pay for the out-of-state placement and to reimburse them for the $6650 they had already paid for past education. *Rulings* (in granting in part and denying in part plaintiff's requests): (1) The joinder of the local school district as a defendant, requested by the state department of education, is not necessary since, while initial responsibility for providing instruction to a handicapped student is placed on the local school district, ultimate responsibility under state statute, rests with the state. (p.551:283) (2) State statute does not prohibit the state to contract with out-of-state public schools for educational services for New York's handicapped students when services for those students are not available within New York. State regulations setting forth such a prohibition are inconsistent with the broad right to a free education set forth in state statute. (p.551:283) (3) The state is ordered to contract with the out-of-state public schools for education of petitioner's handicapped son until a suitable placement in New York can be arranged. (p.551:285) (4) Petitioner's request for reimbursement for tuition costs already paid is denied without prejudice to their seeking such reimbursement in another action against the state and/or the local school district. (p.551:285)

Dubner v. *Ambach*, 426 N.Y.S.2d 164 (1980)

Action by parents who enrolled their handicapped child in an out-of-state facility, for reimbursement of the costs of that placement. Petitioners' child was not able to secure appropriate special services in New York so his school district notified the respondent Commissioner of Education suggesting that the child be placed in a private institution in New Jersey. This proposal was rejected because respondents determined that the State Education Department lacked authority to contract with an out-of-state public institution for such purposes. Petitioners enrolled their son in the facility anyway. A lower court held that the state must contract with the out-of-state public school until a suitable placement in New York could be arranged. Petitioners bring this action seeking reimbursement for the cost of tuition. *Rulings* (in modifying lower court ruling): (1) The lower court was correct in holding that a local school district cannot effectuate placements in out-of-state public and private institutions; only the state educational agency has the power to contract with such institutions for a child's special education. (p.166) (2) However, "it does not follow that they [the state] may be compelled to arrive at a contract with a particular out-of-state public school. . .The plain language of Section 4407 of the Education Laws leaves it to the sole judgment of the Education Department to decide which out-of-state public school can meet the needs of the child. . .[P]etitioners have no right, statutory or otherwise, to insist on the selection of a specific facility for the education of their son. . ." (p.166) (3) Since the costs petitioners have voluntarily incurred may be greater than the expenses associated with the Education Department's eventual contract, monetary relief is not presently appropriate. However, petitioners are not without recourse and may proceed by way of a separate action. (p.167).

Note: In a concurring opinion Justice Mahoney indicated that petitioners must resort to a suit in the Court of Claims if they are to recover money from the state based on the respondents' failure to exercise their statutory powers. Also, in a dissenting opinion Justice Herliny argues that the Commissioner correctly interpretated that statute as limiting his authority to contract with only *private* out-of-state institutions. The Justice notes a distinction between private and public institutions in that under state law the Commissioner could dictate to private schools the terms and conditions as to special services and programs but it is doubtful he would be able to do so with non-residential public schools in a foreign state.

Elliot v. Board of Education of the City of Chicago, Illinois, Appeal No. 63062, Ill. App., 9/13/78

Appeal from dismissal of action challenging on federal and state constitutional grounds Illinois Rev. Stat. 1977, Ch. 122, par. 14-7.02, establishing a ceiling for tuition reimbursement to the parent of a special education student enrolled in a private school, after a public system's certification that its program is inadequate to meet the student's needs. The maximum reimbursement was raised from $2,000 to $2,500 per regular school year in 1977. After the named plaintiff's exclusion from the Chicago system in 1973, his family has paid the difference between annual private school tuition of $2,800 and the state reimbursement. Applications for private placements numbered 6,635 in 1974. The Ill. Const. 1970, art. X, sec. 1, par. 2 provides in part: "Education in public schools through the secondary level shall be free." Rulings (for plaintiff): (1) The history of the adoption of art. X, sec. 1 in 1970 reveals that special education was recognized as an integral part of the educational system and that "[n]o discretion is left with the legislature to deny this system to the public or to require any Illinois resident to pay for this system through the secondary level except by means of taxation, or by fees for items not included within the concept of tuition. See Hamer v. Board of Education of School District No. 109 (1973) 9 Ill. App. 3d 663 ...." (pp. 6-12) The School Code and state regulations reveal that "private special educational facilities providing instruction and training to handicapped students pursuant to section 14-7.02 are but contracted extensions of existing public school systems." (p. 10) (2) Federal law requires full tuition payment after September 1, 1978. Citing 20 U.S.C. §§1401 (16), (18), 1411, 1412, 1413 (a) (4) (1977 Supp.). (p. 11, n. 5) (3) The matter is not moot by reason of an Illinois law, effective in August, 1978, providing for full payment of tuition. Plaintiff seeks damages (i.e., return of monies already paid) and the issue "is one of substantial public interest ...." (p. 12, n. ___)

Erdmann v. State of Connecticut, Civil Action No. H80-253 Complaint 4/24/80, Findings of Fact and Conclusions of Law (D.Conn. 8/22/80)

Action against state and local boards of education by two emotionally disturbed plaintiffs who have been placed in residential facilities for failure to provide the costs of such residential placement. Both plaintiffs were placed in these programs on the recommendation of the school district's Planning and Placement Teams (PPT). Plaintiff Erdmann was allegedly placed by the PPT in residential placement for "other than educational reasons." Action brought pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) the Fourteenth Amendment; and Conn.Gen.Stat.§10-76, seeking to order the state and local boards of education to reimburse plaintiffs for the full cost, including room and board and other extra-tuitional costs of the plaintiffs' placements in residential programs. Rulings (in granting relief to plaintiff Erdmann): (1) "It is not possible to separate [plantiff's] needs from his academic needs when planning an educational program for him." (pp.3-4) (2) Plaintiff requires placement in a residential facility in order to receive an appropriate educational program and to avoid possible irreparable harm." (p.5) (3) Pursuant to 34 C.F.R. §300.302 and 34 C.F.R. §104.33(c)(3) the West Hartford Board of Education is required to provide the entire cost, including the cost of room and board, for plaintiff's residential placement. (pp.5-6)

Note: This case is on appeal to the Second Circuit.

Fritesch v. Ambach, 432 N.Y.S.2d 640 (Supreme Ct., Appellate Div., 3rd Dept., 1980)

Appeal from award of summary judgment in favor of respondent school children, all of whom are blind students enrolled in New York Institute for Education of the Blind and who seek funding for a summer school program. Trial court held that City of New York was responsible for funding the program under Section 236, N.Y.Family Court Act, with the right to reimbursement by the state. Rulings (in affirming): The Family Court has jurisdiction to award reimbursement. (p.641)

In the Matter of Gano, 432 N.Y.S.2d 764 (Family Ct., Del. Cty, N.Y., 1980)

Action by County Department of Social Services seeking an order directing reimbursement to the Department from Theodore Gano for the cost of residential placement of his son. The child in question had been adjudicated a Person in Need of Supervision (PINS) and was committed to the George Junior Republic School and his parent was directed to make payments for his support. Seven months later, the PINS order was vacated upon the finding that the child was a handicapped child pursuant to the provisions of Section 4401 of the Education Law and was in need of placement under §236 of the Family Court Act. Rulings (in denying the motion): (1) Pursuant to Section 4401 et seq. N.Y.Education Law; "a handicapped child has as much right to a free education in the state as any other child, including any specialized education training as may be required." (p.766) (2) "When residential placement is ordered for a handicapped child, the parents are not responsible for any of the expenses of said placement, whether the placement is for a normal ten month school year or for a full twelve months." (p.766) (3)"If the Delaware County Department of Social Services is to be reimbursed for its cost of care to the child, that reimbursement should not be derived from the parent." (p.766) (4) The respondent cannot be estopped from now raising the fact that his child is handicapped simply because he failed to raise the defense at the PINS proceeding; moreover, responsibility for special education programs lies initially with the local school district, which must provide procedural protections in programming.(p.766)

Gargani v. School Committee of the City of Cranston,
C.A. No. 77-0612, D.R.I. 7/21/78 (Clearinghouse #30,741)

Action by parents of a six year-old child suffering from moderate to severe hearing loss, who allegedly experienced a change in her educational placement without being afforded due process notice and hearing as required by Rhode Island regulations (Art. IX §4.0) and federal law (20 U.S.C. §1418(b)(1)(C)). Plaintiff was in a private nursery school program when defendants recommended she be placed in a regular kindergarten with supportive services. Plaintiff's parents objected to such placement alleging the child was not mature enough for kindergarten. All parties agreed that plaintiff was in need of a change in educational placement but disagreed as to what that change should be. While awaiting review of the school district's recommendation, plaintiff's parents placed her in another private day school. Since the transfer, the City of Cranston has paid for special supportive tutoring but not tuition or transportation even though they were paying such expenses at the child's previous placement. Plaintiffs allege that pursuant to 20 U.S.C. §1415(e)(3) and State Regulations (Art.IX §4.0), the child's "current placement" must continue pending proceedings concerning proposed changes in placement or free appropriate public education. Plaintiffs allege that the withdrawal of funding constitutes a change in placement. Defendants however allege that the change of placement which triggers the procedural due process safeguards is limited to recommendations by a school department that the child be shifted along the "special education continuum" that spans from the most to the least restrictive educational opportunities available to the special education child. Defendants argue that since plaintiff has always been placed in a regular classroom with supportive services, the change in day schools does not constitute a change in placement and plaintiffs are not entitled to continue to receive payments for tuition and transportation pending proceedings concerning the proposed change of placement. (The Court had previously refused to hear the merits of the case until plaintiffs exhausted administrative remedies.) Rulings: (1) A dispute over change in the provisions of free, appropriate education triggers the right to maintain the current placement pending resolution of the dispute. (p.5) (2) "Withdrawal of funds for [plaintiff's] placement in a private school constitutes a change in current placement prohibited by federal and Rhode Island law. (p.7) (3) "To now hold that, by virtue of the transfer, the Garganis lost their right to continued tuition payment by the city, would place a premium upon freezing every aspect of the child's placement even when all parties are in agreement that certain aspects require alteration in the child's best interests." (p.8) (4) "Because the court finds that the state is obligated to pay tuition and transportation costs since September,1975, under state law, the Court need not reach the federal constitutional claim that due process requires continuation of Nicole's [plaintiff's] current placement pending appeal." (p.11) (5) Plaintiffs are entitled to a hearing for the purposes of resolving what educational placement would be in the best interests of the child. This review will be before the state educational agency. (p.11) (6) A state educational agency hearing officer cannot be disqualified merely because the economic interests of the state run counter to plaintiff's claim. Rather, it need only be assured that the hearing officer does not have a "personal or professional interest which would conflict with his or her objectivity in the hearing." (34 C.F.R. §300.507(a)(2)) (p.12).

Note: This case is on appeal to the First Circuit.

Grynes v. Madden, C.A. No. 78-105 (D.Del. May 3, 1979)
3 EHLR 552:183. (Clearinghouse #30,743)

Action by parents of a handicapped child seeking review of the State Board of Education's determination that their child was not entitled, under state law, to private placement with financial aid. Prior to August, 1977, state law authorized partial tuition reimbursement to parents of handicapped children for whom there was no adequate public school program within a reasonable distance of their homes. Plaintiffs' child was at this time in private placement and plaintiffs were receiving tuition reimbursement. In August, 1977, the relevant state law was repealed. The new enactment (14 Del.C. §3124) provides for a free, appropriate public education but provided that private placement with full tuition reimbursement would be granted only to "complex or rare" handicapped persons. The local school district therefore denied plaintiffs of any further assistance for the placement of their child in private school. Plaintiffs appealed unsuccessfully up and through the state board of education, and now bring this action seeking a declaratory judgment that their child is a "complex or rare" handicapped person. Rulings (in granting plaintiffs' motion for summary judgment): (1) "The decision that the denial of tuition had been proper was based, not on a factual finding that the District could presently meet James' educational needs, but rather on a conclusion that the District had a duty to attempt to meet those needs and, that if it turned out that the District was unable to do so, it must provide tuition relief. Such an approach is erroneous since the state statutory standard requires full tuition payment when the total impact of a handicapping condition is such that the student cannot benefit from the regularly offered free appropriate public education programs and, here, no evidence was offered on the programs then available. (p.552:185). (2) Rather, plaintiffs' child first has a right to a due process hearing to determine whether he was a "rare or complex" handicapped person. (p.552:185). (3) "Because the District has the burden of justifying its refusal to approve private placement and because that necessarily required showing that James could 'benefit from the regularly offered free appropriate public education programs,' it follows that the hearing examiner should have reversed that initial decision and ordered that full tuition be made available." (p.552:185) (4) For the District to attempt to meet its burden of showing what it has to offer a handicapped person by means of an affidavit filed in court is insufficient since the District has an obligation to make an early and expeditious showing of what it has to offer so that an informed decision about where and how to educate a student can take place. (p.552:185) (5) Pursuant to the state statute, full tuition reimbursement, transportation, and maintenance are owed the family. (p.552:185).

Guempel v. State of New Jersey, 387 A.2d 399 (Superior Ct. of N.J., 1978) Clearinghouse #25,030

Father of mentally retarded child who is resident of state school contends that he should not be required to pay the cost of the child's care. Plaintiff does not contest the state's determination that he has the ability to pay the costs without undue hardship but claims that under P.L. 94-142 (20 U.S.C. §§1401 et seq.) and §504 of the Rehabilitation Act (29 U.S.C. §794) and under the New Jersey constitution and its guarantee of a right to a "thorough and efficient" education for all students, the state is prohibited from assessing him for the costs other than minimal costs for food, clothing, and physical/medical needs. Rulings (in denying, in part, relief): (1) Plaintiff's daughter is so severely mentally retarded that her training is, under state statute, the responsibility of the State Board of Education and the State Department of Human Services rather than a local board of education. (p.401) (2) The school in which this student resides is,despite its title, not primarily an educational institution. (p.406) (3) The education clause in the New Jersey constitution does not require the state to provide any care, custody or safekeeping services, much less to provide them without cost. (p.407) (4) State social welfare statutes do require care, custody, and safekeeping but subject to the duty of her estate and family to pay the costs to the extent they are financially able. (p.407) (5) This student's placement in the school was not made for educational reasons. (p.407) (6) The procedure and formula for determining the costs of enrollment at the school is authorized by statute, not prohibited by the state constitution, and is equitable. (p.407) (7) The record does not establish any failure of the state to meet P.L. 94-142 requirements (20 U.S.C. §1412) of providing free appropriate public education to all handicapped children; furthermore, the Sept. 1, 1978 date for compliance has not yet arrived. (p.408) (8) Provisions of §504 of the Rehabilitation Act and its implementing regulations (45 C.F.R. §84.33) are not applicable here since the residential placement is not for the purpose of providing education. (p.408) (9) Even if plaintiff's §504 and P.L. 94-142 claims were valid, the present proceeding would not be the appropriate forum since the relief would be loss of federal funds to the state rather than a right to a monetary set-off for plaintiff in a state court proceeding. (p.408) (10) The state statutory classification of the handicapped does not create a suspect class within the meaning of equal protection. (p.409) (11) While there is some point to plaintiff's argument that children in the state school for the mentally retarded are not receiving treatment equal to that afforded students in ordinary schools, since the educational role of state schools is of much less importance than their custodial role, there is no real comparison between the two types of schools and equal protection does not apply. (p.410) (12) There are, however, significant equal protection problems presented by the disparate treatment afforded to severely and profoundly retarded students assigned to day treatment centers, where there is no charge for services, as opposed to those assigned to state residential schools, where costs are assessed. (p.411) (13) Since all educational costs are paid for day treatment students, residential school students are entitled to a credit for their costs equal to the value of the education provided to day treatment students; "Once the state decide[d] to supply $5500 worth of care to severely and profoundly retarded children in day care centers without charging any affected child for that care, regardless of the financial means of that parent, then all parents of severely and profoundly retarded children are entitled to $5,500 worth of comparable care, without paying for it, and regardless of financial ability to pay." (p. 412-13)

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Henkin v. *South Dakota Department of Social Services*,
498 F.Supp. 659 (D.So.Dak.1980)

Plaintiff, a twenty-four year old multi-handicapped, severely impaired woman in need of constant care, seeks tuition reimbursement for her institutional care in Texas, or in the alternative, placement in an appropriate program in South Dakota or compensatory damages for the value of her placement for her lifetime in the Texas institution. While plaintiff is eligible for services under Title XIX of the Social Security Act, the Texas institution is not Title XIX certified and plaintiff contends no Title IXI certified institution is appropriate. *Rulings* (in favor of plaintiff): (1) Plaintiff falls within the purview of the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. §§6000 *et seq.*) and, as such, falls within its benefits, including the benefit of having some of the funds received by the State of South Dakota applied to pay for her institutionalization. (pp.664-65) (2) Plaintiff has a private right of action under the D.D. Act. (p.665) (3) Simply because plaintiff is qualified to receive Title XIX funds does not mean that she cannot be a priority person for receiving funds under the D.D. Act (p.666) (4) A priority person for receipt of services under the D.D. Act is one whose needs cannot be met under P.L. 94-142 or certain other federal aid schemes. Plaintiff's funding under P.L. 94-142 was terminated when she reached age twenty-one and there is no appropriate Title XIX care facility where plaintiff can receive Title XIX benefits. The plaintiff falls within a gap of services offered to the mentally retarded and can be considered a priority person for the purposes of the D.C. Act. (p.666) (5) There is nothing in the D.D. Act to suggest that funding for extended care for individuals is prohibited. (p.666) (6) The D.D. Act covers all eligible developmentally disabled persons, not just those in state institutions. (p.667) (7) Since all relief requested here is prospective, allocation of funds from the state treasury is not barred. (pp.667-68) (8) Defendants must provide funds for plaintiff's residency at the Texas school in an amount at least comparable to what it would expend for plaintiff's stay in an in-state facility. (p.668)

How to Look at Your State's Plans for Educating Handicapped Children, The Children's Defense Fund, 1520 New Hampshire Ave., N.W., Washington, D.C. 20036

This booklet offers a description of state obligations under the Education of the Handicapped Act, Part B, as amended by Public Law 93-380 (the Education Amendments of 1974). The reader is told of the provisions which every state must include in its "state plan" if it is to receive funds under the law, and the manner in which parents might have an impact on the development of those plans.

In re Jessup, 379 N.Y.S.2d 626 (Family Ct., N.Y.C., 1975)

Petition seeking order to direct New York City to pay for the tuition costs of petitioner's emotionally handicapped son. The city board of education has certified that it is unable to provide an adequate educational facility for the child. The state education department has certified the private school which the child attends to be a suitable special educational facility, and it has approved state aid for part of the child's tuition. The city has moved to dismiss the petition for lack of subject matter jurisdiction on the ground that the Family Court Act covers only physically handicapped children. Rulings (in denying motion): (1) While the legislature previously amended the scope of the Education Law to eliminate the distinction between physical and other handicaps, the legislature inadvertently failed to make corresponding changes in the Family Court Act (F.C.A.). The intent of the legislature was to broaden the definition in the F.C.A. The F.C.A. and the Education Law must be read together. (631) (2) Although the right to education is not guaranteed by the United States Constitution, when a state undertakes to provide free education to all students, it must not discriminate against emotionally handicapped children. (632)

Johnson v. District of Columbia Board of Education,
C.A. No. 80-0897 (Memorandum)(D.D.C. 4/11/80)

Action by 15 year old child suffering from dyslexia, seeking enforcement of a state court order for his placement at the New Dominion School. A superior (family) court order for plaintiff's placement at the New Dominion School directed the Department of Human Services to pay all tuition costs.While the New Dominion School has accepted plaintiff, DHS refused to pay for the tuition. The superior court found DHS in contempt but an appeal from that finding was made. Parallel attempts to have plaintiff placed through the public school system were unsuccessful. The efforts of the superior court to place plaintiff apparently being frustrated, plaintiff brought this action in federal district court seeking injunctive relief. Rulings (in granting plaintiff's motion for a temporary restraining order): (1) Plaintiff is entitled to injunctive relief in that he has demonstrated a substantial case on the merits and would suffer irreparable harm if the request were not granted. (p.3) (2) The potential for irreparable harm is twofold. First, plaintiff, who has been without appropriate placement,would remain without an appropriate education for an uncertain period of time, and,second, if action is not taken plaintiff may lose his place at the New Dominion School. (p.4) (3) "Placement will not cause substantial harm to the defendants and the public interest favors the immediate placement of the plaintiff." (p.4) (4) Since defendants have failed to prepare or report any recommendation regarding placement of the plaintiff as directed by the superior court, there is no reason at this point to refer the matter back to the agency for an administrative hearing. (p.5) (5) Further, under the orders issued in Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972),an administrative hearing officer is not permitted to address the adequacy of a placement suggested by the parents so there is no reason to refer the matter back to the school district (p.5) (6) Any proposed placements offered by the school did not contain appropriate notice. (p.5).

In re Juvenile Case §1089, 398 A.2d 65 (Sup.Ct. N.H., 1979)

Appeal from a district court decision which held that the school district in which a neglected and handicapped child resided was responsible for the child's tuition in an educational program. The child in this case is mentally retarded. The child was voluntarily enrolled in a private program and lived with one of the program's staff members until he was sent to a licensed foster home and enrolled in the Keene State College program for intellectually handicapped children. After the child was found to be neglected, custody was awarded to the division of welfare. The town of Londonberry (town of the natural parent's residence) was ordered to pay his support. The court also ordered the Keene School District (where the child's foster parents live) to pay the cost of the child's tuition, claiming Keene to be the district of residence. Keene alleges that the child is a resident of Londonberry and was placed in the Keene foster home solely for the purpose of attending school. The court however held that the child had been placed in the foster home for the dual purpose of attending the private school as well as to enable him to live in a good home. Rulings (in affirming as modified): (1) The district court's holding that the child is a residentof Keene and that the Keene school district should therefore pay the cost of tuition is affirmed. (p.67) (2) Even though Londonberry was ordered to pay the child's general support, RSA 186-A:8 specifically provides that liability for the tuition of a handicapped child lies with the school district in which the child resides. (p.67) (3) The general rule is that "a student resides where he actually lives or dwells, unless he moved to the district solely or primarily for the purpose of attending its public schools." (p.67) (4) Pursuant to RSA 198:23 and 198:24, certain tuition funds will be paid by the State to school districts in which there are foster children placed in foster homes by the department of welfare. These statutes suggest that the legislature intended that towns in which there are foster homes will be held responsible for the education of foster children residing in those homes, but will receive some State aid. (p.67) (5) The district court order which required the Keene school district to pay for any program chosen by the foster family or division of welfare is modified to allow the Keene School District to make an appropriate placement, because allowing the foster family alone to make the decision would violate P.L. 94-142. (p.68).

Matter of Kaye, 379 N.Y.S.2d 261 (Family Ct., Rockland County, 1975)

Petition requesting a court order providing for the education of a child as a handicapped child. Petitioner alleged that his daughter suffered from neurophysiological maturational lags. The order was granted, requiring that the county pay $2200 for the cost of the educational services. The county acquiesced in the determination that the child was entitled to special education, but raised a question on the payment of tuition costs. Rulings (in ordering that the district contract for the child's special education): (1) The court will not consider directing the State Commissioner of Education to reimburse the county for one-half the tuition, pursuant to New York law, until the county has presented the appropriate voucher and has been refused payment. (263) (2) A child suffering from a neurophysiological maturational lag is a handicapped child and thus within the family court's jurisdiction. (264-265) (3) Being authorized under New York law to contract with a school outside the district, the school district is ordered to contract with a designated county day school in the amount of $2200 for the education of the child irrespective of the fact that the State Commissioner did not approve the education directed for the child. (265-269)

Kruelle v. Biggs, 489 F.Supp. 169 (D.Del. 1980)

Action by parents of a profoundly retarded child on behalf of themselves and their son alleging denial of a "free appropriate public education" in that defendants refused to place their child (Paul) in a residential placement. Paul is a physical and emotionally disabled child who has not developed any basic self-help skills. Defendants allege that the additional services residential placement could provide for him are "more in the nature of parenting than of education" and therefore the school district should not have to provide for their costs. They further contend that the day program at the Meadow school adequately meets Paul's needs. After administrative hearings and appeals through the state level,plaintiffs bring this action pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.) Rulings (in favor of plaintiffs): (1) Plaintiff student is in need of "a greater degree of consistency of programming than many other profoundly retarded children, as plaintiff's emotional problems are interfering with his ability to learn." (p.178) (2) As every effort made to place plaintiff in a less restrictive environment, such as after school instruction in the home, has failed and occasioned plaintiff's regression, placing plaintiff in residential placement does not violate the least restrictive environment requirement of P.L. 94-142. (p.174) (3) Ultimate responsibility for providing a "free appropriate public education" and arranging full payment lies with the State Board of Education. (p.174).

Lafko v. Wappingers Central School District, 427 N.Y.S.2d 529
(Supreme Ct., Appellate Div., Third Dept., 1980)

Action by parents of handicapped child to annul the decision of the state Department of Education to deny approval of the individual placement of their child at the St. George's school. Petitioners also seek reimbursement for the tuition paid to St. George's for academic year 1977-78. Parents placed their child at St. George's after the school district failed to consider her as a handicapped child. The Commissioner of Education had not, howver, approved St. George's for the education of handicapped children. Later, the school did consider the child's handicapped status and then forwarded a request for approval of services for resident handicapped children at St. George's to the New York State Dept. of Education. The request was refused because the submitted materials did not comply with Section 4401 of the Education Law (in that the Commissioner had not approved the school in question). Petitioners therefore commence this action to annul the Education Department's determination. Rulings: Since the N.Y. Education Law §§4401 et seq. does not authorize the execution of contracts between a private school and a board of education unless the private school has been approved by the Commissioner, the Commissioner was justified in denying the petitioners the relief sought.

In re Laura A., 419 N.Y.S.2d 40 (Family Ct., Monroe Cty., N.Y., 1979)

Parents of handicapped children filed petition seeking orders for payment for preschool special educational services pursuant to New York Family Court Act §236. The county moved to dismiss the petitions as being prematurely filed as they were filed three months before the beginning of the school year, contending that such petitions must be filed during the school year for which reimbursement is sought. Rulings: (1) Handicapped children have a right to free special education under the state constitution and statutes. (p.41) (2) The "Family Court Act §236 provided no time limit for the filing of petitions. . .the petitions in question, filed some months prior to the commencement of services, are timely filed." (p.41)

Levine v. State Department of Institutions and Agencies, 390 A.2d 699 (Superior Ct., N.J., 1978).

Guardians of a severely brain damaged and profoundly mentally retarded child who is a resident at a state institution bring action seeking to recover for all costs of the institutionalization. The institution involved charges plaintiffs according to a schedule based upon the financial ability of the patient or responsible relatives to pay part or all of the per capita cost for care and maintenance. Plaintiffs have been required to pay $230 a month under an "ability to pay" scheme and bring this action to compel defendants to provide a "total education" to their ward without cost to plaintiffs. Lower court entered summary judgment against the guardians and they appealed. Rulings (in affirming): (1) The plaintiff's interpretation of their child's general 24 hour a day custodial care and maintenance as being "educational services" and therefore provided free of charge is "a perversion and utterly specious" even under the state constitution guaranteeing a right to "thorough and efficient" education. (2) "We perceive nothing constitutionally offensive or otherwise improper in providing for the imposition against a patient or his responsible relatives of all or part of the per capita cost to the state of the custodial care and maintenance of the patient at a [state institution], particularly where, as here, the imposition is levied according to the ability to pay." (p.701) (3) As the magnitude of liability is determined according to the father's ability to pay, taking into consideration all the circumstances of his life, the statute [NJSA 30:4-66] requiring payment is not violative of due process of law. (4) The holding in Guempel v. State, 387 A.2d 399 (see Bulletin, p.919), holding in part that, in light of the educational services furnished by the state without charge to non-custodial retarded children at day care centers, the institutional child or his responsible relative is entitled to an equivalent credit against the child's per capita cost of general care and maintenance is hereby disapproved, p.702. (5) As the parents of noninstitutionalized children in day care centers are themselves providing care and maintenance and the parents of institutionalized children are not, there exists a reasonable distinction between the two classes to justify the difference in treatment of the two classes. (p.702) (6) "Where the educational services provided at the day care centers are the same or essentially similar to those supplied to the institutionalized child. . .we cannot conceive that there is any violation of equal protection rights." (p.702)

Note: The reported opinion does not indicate whether plaintiffs claimed a violation of any federal statute or regulations.

Levine v. Institutions and Agencies Department of New Jersey and Guempel v. New Jersey, 418 A.2d 229 (Supreme Ct., N.J.,1980) 3 EHLR 552:163

Action concerning the extent to which parents of profoundly retarded institutionalized persons are responsible for payment of costs for some of the educational services provided the students. The parents assert that the expenses they must pay impinge on their children's rights to a "thorough and efficient" education as guaranteed by the New Jersey constitution, that their rights to equal protection are violated since other handicapped students who attend day care programs and reside at home are provided educational services free of charge, and that the state is required to provide free education under federal law. Rulings (in modifying and remanding): (1) "Parents with the financial ability fully to support their children are not constitutionally entitled to require the public to assume this obligation." (p.231) (2)While society has an obligation to provide for the care of mentally retarded persons, the constitutional right to a thorough and efficient education applies only to those young people who have the capacity for improvement through such education and the potential thus to lead constructive social and political lives. (pp.236-37) (3) "There is a category of mentally disabled children so severely impaired as to be unable to absorb or benefit from education. It is neither realistic nor meaningful to equate the type of care and habilitation which such children require for their health and survival with 'education' in the sense that that term is used in the constitution... The constitutional mandate simply does not apply to these unfortunate children." (p.237) (4) "Conceededly, it is difficult to differentiate those mentally retarded children minimally capable of absorbing education and, hence, constitutionally entitled to an appropriate education, from those children so impaired that they cannot be educated at all in the constitutional sense. Nevertheless, this complex definitional task has been essayed and workable guidelines have been formulated to assist in the classification of those mentally impaired children who are constitutionally entitled to a free public education. See Armstrong v. Kline, 476 F.Supp. 583, 587-88 (E.D.Pa. 1979)." (p.238) (5) Students defined under state statute as "educable" or "trainable" fall within the scope of the constitutional right; those who are "subtrainable" do not. (p.239) (6) While there is a true constitutional right to education, the habilitation efforts required in the care of statutorily subtrainable, profoundly impaired children, are not included within this constitutional guarantee and are not components of that fundamental right. (p.242). (7) For the purposes of equal protection analysis, a differentiation among subtrainable, school-age children on the basis of whether or not they are institutionalized, does not create a "suspect" classification. (p.242). (8) There is a rational reason for a differential funding scheme for institutionalized subtrainable retarded persons as opposed to the funding scheme for such individuals who live at home. (p.243) (9) The cases are remanded for appropriate administrative proceedings to determine the precise amount which can be allowed as a credit to parents for education and associated services. (pp.243-46) (10) One justice, dissenting (a) "To say. . .that the right to education necessarily depends upon the ability to exercise the franchise is to deny education its fundamental status. The same is true concerning the majority's attempt to subordinate the right to compete in the labor market. . .On this frivolous theory, those who neither vote nor work may be required to reimburse the State for the cost of their public education. This apparent absurdity is the majority's result today." (p.248) (b) "I cannot accept a definition of education which does not provide to each child the training and assistance necessary to function as best they can in whatever will be their environment - even if that environment will be insulated from the world of politics and economic competition. The ability of even profoundly impaired children to benefit from education is universally acknowledged." (pp.250-251) (c) "Every impaired child is entitled to an education appropriate to his abilities." (p.251) (d) The finance scheme at issue here impinges on the right to a free education. (p.252) (e) Plaintiffs were denied the free education afforded their peers not because they are ineducable, but because they are institutionalized. (p.256)

Note: The dissent is a lengthy and well-reasoned critique of the majority decision.

Matter of Levy, 345 N.E.2d 556 (1976), appeal dismissed for want of a substantial federal question, 45 U.S.L.W. 3247 (10/5/76)

Appeals from dismissals of challenges, on equal protection grounds, to Section 234 of the Family Court Act authorizing orders requiring parents of handicapped children to contribute to the maintenance costs of children placed in private residential facilities. Tuition and transportation costs are paid in full by the state, as are maintenance costs for blind and deaf children, giving rise to the claim. The appeal involves four consolidated cases where parents were ordered to pay all or part of the maintenance costs. Rulings (in affirming): (1) Handicapped children do not constitute a suspect class, nor is there a fundamental right to education. Thus, the "traditional rational basis test" applies. (558) (2) A rational basis does exist for the distinction made as to maintenance costs. "[A]s a matter of history and tradition our society has accorded special recognition to the blind and to the deaf in the field of education as elsewhere....[T]he policy judgments and the priority determination of our history are not totally to be rejected, espeically when those judgments and determinations have enjoyed public acceptance for a long period of time....Our legislature in granting preferences to parents of the blind and deaf may well have judged at the time that children with these handicaps were more educable in general than were those with other handicaps. (559-560) (3) The legislature may select one phase of one field and apply a remedy there, neglecting the others. (560)

Lombardi v. Nyquist, 406 N .Y.S.2d 148 (Supreme Ct., Appellate Div., Third Dept., 1978).

Appeal from a judgment of the Supreme Court at Special Term to review respondent's refusal to approve a contract between petitioners, local school district and a private agency. Petitioner is a teenaged neurologically impaired student; his local school district recommended he attend a private program (the Trinity-Pawling School). Pursuant to Article 89 of the New York Education Law, a local school district may contract for "special services or programs," with a private agency provided the approval of Commissioner of the State Education Department is obtained. Here, the Commissioner refused to approve petitioner's placement on the grounds that Trinity-Pawling was not an approved school for the handicapped. Petitioner brought his original action challenging such refusal on the ground that it was arbitrary and capricious. After a finding for the Commissioner, petitioner brought this appeal. Petitioner contends that at special term respondent did not contest petitioner's allegation that Trinity-Pawling was the only appropriate program for petitioner's needs. Petitioner further argues that the Trinity-Pawling program is *best* suited to his needs and that any lesser program, even if adequate, would be a denial of his constitutional and statutory rights to a free appropriate education. *Rulings* (in affirming denial of relief): (1) "We find from the record that there is insufficient information to establish whether or not an approved adequate alternative educational program to that of Trinity-Pawling is available." (p.149) (2) Since Article 89 of the Education Law is by nature reform legislation, the appropriate standard to be applied in reviewing the application of Article 89 is the traditional rational basis test.(p.149) (3) The construction given relevant education statutes and regulations by respondent is not irrational or unreasonable and should be upheld. (p.149) (4) That a child may not be able to attend a school that is particularly suited to his needs because such school is not an approved school does not render this reform legislation unconstitutional.(p.150). (5) We find respondent's interpretation of the statute and the standards for approval to be reasonable and rational. (p.150).

Lux v. *Connecticut State Board of Education*, 386 A.2d 644
(Ct. of Common Pleas, Fairfield Cnty., Conn. 1977)

Appeal by parents of a handicapped child from the decision of the state board of education to remove the child from private placement and place him in a learning disabilities program in the public school. David (the child in question) had been placed in a private institution for 3 1/2 years when the public school review team found that the private school had enabled David to progress at such a rate that the Fairfield public schools could provide a learning disabilities program for him. The proposed program was rejected by plaintiffs, who then (in 1971) placed David back in the private school at their own expense. David was reviewed during a 3 year period at the private school but was still recommended for public school placement. Plaintiffs appealed the recommendation that David be placed in public school; the State Board of Education denied the appeal. They also seek reimbursement for the cost of his education during the last three years (1971-1973) in the private school. Acting brought pursuant to Conn. Special Education Law C.G.S.A. §§10-76a *et seq*. *Rulings* (in denying plaintiff's appeal): (1) Although the state board found that an educational program fully suited for David had not been established by the public school, it is only because "the Fairfield school board did not have the opportunity to provide a special program for David because his parents unilaterally decided to maintain their child at the Foundation School." (p.646) (2) "There was nothing arbitrary, illegal, or in abuse of discretion of the defendants' failure to order reimbursement of expenses for the 1971-1972 and 1972-1973 school years, as the defendant could not consider the programs for those years since the appeal was only for the 1973-1974 school year." (p.647). (3) Section 10(6) of the guidelines issued by the state department of education concerning G.C.S.A. §10-76a-g stresses that unilateral action by a parent in placing a child in a private school does not obligate a local board of education to reimburse the parents. (p.647) (4) "The Fairfield board of education was not guilty of inaction in David's case and cannot be obligated to reimburse the plaintiffs." (p.647).

Michael P. v. Maloney, No. 78-545, D.Conn., Consent Decree (3/19/79) Clearinghouse #25,392

Class action on behalf of all children in Connecticut entitled to a free appropriate special education and whose parents or guardians now or will be required to contribute thereto. The plaintiff was denied residential placement because plaintiffs' parent was economically unable, and therefore unwilling, to enter into a "contribution contract" whereby the parent would pay for non-educational aspects of the placement. The complaint alleges that such a requirement is in violation of 45 C.F.R. §121a.302 of the Education for All Handicapped Children Act. Consent Decree: The defendant Commissioner of Children and Youth Services agrees that no parent of a handicapped child shall be either implicitly or explicitly obligated to pay any portion of the costs of residential placement when it is required to afford the child an appropriate education.

New Mexico Association for Retarded Citizens v. State of New Mexico, 495 F.Supp. 391 (D.N.M., 1980).

Class action suit brought by organizations concerned with handicapped children challenging New Mexico's practice of refusing federal funds available under P.L. 94-142 (20 U.S.C. §1401 et seq.) and thereby failing to provide handicapped children a free appropriate public education and related services. Plaintiffs argue that the State's failure to apply to federal funds under P.L. 94-142 while applying for other federal funds is discriminatory against handicapped children and therefore a violation of Section 504 (29 U.S.C. §794). Plaintiffs further assert that the State plan submitted to HEW pursuant to the requirements of P.L. 91-230 and P.L. 93-380 (predecessors to P.L. 94-142) constitutes a continuing obligation to seek federal funds to implement and attain the educational goals for which the plan was initially prepared. Rulings (in granting in part plaintiffs' motion for declaratory and injunctive relief): (1) "The discretionary nature of P.L. 94-142 frees the state to participate or not in the acquisition of federal funds under the Act as it chooses." (p.394) (2) Since federal funding to the state under Public Laws 91-230 and 93-280 expired in June 1978, the State's plan under the Act expired as well and, absent a decision of the State to participate in a plan and acquire funds under P.L. 94-142, the State's obligation to implement educational goals pursuant to the federal funding statute ended when its plan and funding expired in June of 1978. (p.394) (3) Plaintiffs have a private right of action under Section 504. (pp. 395-96) (4) Plaintiffs have standing to sue and to obtain the relief requested; the Eleventh Amendment (sovereign immunity) is no bar. (p.396) (5) In proving acts of discrimination under Section 504, the presumption is that normal school age children are provided with adequate educational services appropriate to their needs. The obligation to rebut this presumption rests with defendants; plaintiffs are not required to prove as an essential element of their claim that nonhandicapped persons have not been subjected to the same discrimination. (p.396). (6) Since the State is a recipient of federal financial assistance for the operation of education programs in the State, the regulations promulgated under Section 504 apply to the state as well as the local school districts in New Mexico. (p.397) (7) A state may not be technically required to monitor compliance with Section 504. However, the state's status as the recipient of federal financial assistance obligates it to prohibit programs benefitting from federal financial assistance received by the State, to discriminate, either directly or indirectly, against handicapped persons within the context of the regulations promulgated under Section 504. (p.397) (8) "Under Section 504 discrimination against the handicapped by recipients of federal financial assistance does not require a finding that any such discrimination is intentional ... Failure to adequately fund programs and personnel so as to secure compliance with Section 504 results in precisely the effect prohibited. (p.398) (9) "Injunctive relief shall be granted on behalf of the plaintiff class to the effect that defendants be enjoined to provide the members of the class with a free appropriate public education as that term is defined by the regulations establishing compliance under Section 504." (p.399) (10) Plaintiffs are awarded costs and attorneys' fees pursuant to 29 U.S.C. §794(a)(2) and (b) and 42 U.S.C. §1988. (p.399).

Note: This case is on appeal to the Tenth Circuit.

New York State Association for Retarded Children, Inc.
v. Carey, No. 72 Civ. 356/357 (E.D.N.Y. 1/2/80)
3 EHLR 551:435 (See Bulletin, p.880) Clearinghouse #28,796

Following the Consent Judgment which placed former Willowbrook Developmental Center students in the public schools, plaintiffs (former Willowbrook students) bring this action seeking an order enjoining the New York State Office of Mental Retardation and Developmental Disabilities from terminating funding for the placement of plaintiffs and members of their class in the homes of their natural parents. Defendants allege that the funding of natural home placement of mentally retarded residents of New York State is a legislative policy which has been repeatedly rejected by the state legislature. Ruling (in granting plaintiff's motion): (1) In order to comply with the consent judgment that former Willowbrook residents should be placed in an environment with the "least restrictive and most normal living conditions possible," defendants are enjoined from refusing "to certify the natural parents of that class member as family care providers and to provide the funding reasonably necessary to effectuate such placement consistent with the standards applicable to natural and foster home placements previously made by defendants." (p.551:443).

North, et al., v. District of Columbia Bd. of Ed. ,
471 F.Supp. 136 (D.D.C. 1979)

Action by multiply-handicapped (epileptic and seriously emotionally disturbed) boy and his parents alleging that D.C. Board of Education failed to provide for child's placement in residential facility when plaintiff was discharged from private placement due to emotional problem and defendants refused to find emergency residential placement for the child. Action brought pursuant to Education for All Handicapped Children Act (P.L. 94-142), Section 504 of the Rehabilitation Act of 1973, the decision in Mills v. Board of Education of D.C., 348 F.Supp. 866 (D.D.C. 1972), Rules of the D.C. Board of Education and the Fifth Amendment. Defendants allege they are only responsible for child's educational needs (not emotional needs) which can be met at a special education day program. Defendants further allege that child's emotional problems should be the responsibility of the social service agencies and not school authorities. For social service agency to assume this responsibility would require a neglect proceeding against the parents; that proceeding was pending at the time of this action. Rulings (in granting plaintiffs' motion for a preliminary injunction): (1) Education for All Handicapped Children Act and its regulations (45 C.F.R. §121a.302), Section 504 and its regulations (45 C.F.R. §§84 et seq.) and Mills "clearly place responsibility for providing residential educational services to plaintiff on these defendants." (p.140) (2) "Since. . .relegation of the plaintiffs to the purely social recourse, i.e., the neglect procedure, is fraught with peril to the child and the family, use of the federal education laws and placement pursuant to those laws is the only legally available alternative and is clearly required." (p.141) (3) Plaintiffs are not required to exhaust further administrative remedies since an administrative determination of the need for residential placement was previously made ; the only issue is who should pay for the services, and further pursuit of administrative remedies would mean continued confinement in an inappropriate facility. (p.141) (4) Defendants are responsible for the cost of child's residential placement. (p.142)

O'Grady v. Centennial School District, 401 A.2d 1388
(Pa.Comwlth. Ct.,1979)

Action by parents of a handicapped child seeking reversal of the Secretary of Education's holding that petitioners (parents) did not have standing to contest the school district's recommended placement for their son (Steven) because the child had been declared a dependent child and cômmitted to the custody of a private school. Steven had been in a special education program in the school district from 1973-1977 when he was hospitalized for severe stress. During the period of hospitalization,the school district recommended private placement, but claimed limitation of its financial responsibility to payment for the educational component of the residential program. Steven's parents then requested a due process hearing upon Steven's release from the hospital. The school district recommended a day program, which his parents rejected because it was not a residential placement. The hearing officer held that Steven should be placed in a residential program. The school district appealed to the Secretary of Education, who held that a court order committing Steven into the custody of the private school relieved the parents of responsibility for Steven's education and that they therefore lacked standing to contest the school district's recommendation. Rulings (in reversing): (1) Standing is concerned with whether the complaint has an interest in the subject of the litigation which the law says is sufficient to qualify him as a suitor. "Clearly, the parents of a fourteen year old child have sufficient interest and therefore standing to litigate the subject of the proper discharge by his school district of its statutory duty to provide him with education despite the fact that the child is temporarily and, as the parents assert, because of the delay occasioned by this litigation, committed to the custody of an institution." (p.1390) (2) Pursuant to 22 Pa.Code §1331(b) the parents of any school-aged child have the right to invoke due process procedures. (p.1390) (3) The school district's argument that it is no longer responsible for Steven's education because the private school is not located in the school district is without merit since, pursuant to 24 P.S. §13-1302, a child is considered a resident of the school disrtict in which his parents or the guardian of his person resides. (p.1391) (4) The private school is not the child's guardian since, pursuant to 42 Pa.Code §6302, a custodian of a dependent child is a person other than a legal guardian. (p.1391)

Oster v. Boyer, C.A. No. 77-0348 (D.R.I. 2/5/79)
3 EHLR 551:152

Action by parents of a fourteen year-old autistic child to determine which governmental body is responsible for funding their child's special education. Plaintiffs allege that they have been forced to contribute to their child's education while the parents of other handicapped and normal children have not. The action is brought pursuant to 42 U.S.C. §1983, against officials on the local, state, and federal levels. Plaintiffs allege the local school committee must provide for free special education to their child pursuant to Rhode Island law (R.I.G.L. §16-24-1). Plaintiffs further allege that state officials are parties as the education their child was receiving was partially funded by the state pursuant to R.I.G.L. §40.1-7. Finally, action is brought against federal officials for disbursing federal funds to the state without properly monitoring the state's special education programs. The federal defendants and one state defendant (the director of Department of Mental Health, Retardation, and Hospitals (MHRH) moved to dismiss the action on the grounds that the federal government had no duty to monitor the state's special education programs during the 1971-77 period in question and that the state-level MHRH was not responsible for providing a special education to plaintiffs' child. Finally, the local defendants allege that they were not responsible for plaintiff's child's education but rather, pursuant to §40.1-7, MHRH was responsible for her education because she was "emotionally disturbed." As a result MHRH and plaintiffs were sharing the cost of child's education. The amended state statute (§40.1-7-8) now requires parents to contribute only insurance proceeds towards an emotionally disturbed child's treatment. Rulings (in denying in part motions to dismiss): (1) Although the state statute has been changed, the case is not moot because the required insurance contribution may violate P.L. 94-142 and because plaintiff's seek damages. (551:154) (2) As this case is brought pursuant to 42 U.S.C. §1983, there is no need to exhaust all administrative remedies even though state and federal special education laws would require exhaustion. (p.551:154) (3) While plaintiffs have not exhausted all administrative possibilities they did not get final decisions from the local school board and MHRH and therefore "this case meets the necessity for ripeness to the extent that there must be at least some definitive administrative or institutional determination before a Section 1983 action may arise." (p.551:154). (4) Prior to September, 1978 the federal defendants were under no obligation to insure each child received a free appropriate public education, as prior to September, 1978 states were only obligated to develop a "goal" to provide special education. Therefore, since plaintiffs' claims concern 1971-77, federal defendants are dismissed. (p.551:154-55) (5) Before determining the liability of the State defendants, the Rhode Island Supreme Court should be given the opportunity to resolve the conflict between R.I.G.L. §16-24-1 which provides "the school committee. . .shall provide such type of special education that will best satisfy the needs of the handicapped child." and §40.1-7 which requires the state only to expend funds on "medical and psychiatric care" of "emotionally disturbed children" (p.551:155). (6) Once the state court resolves this conflict, the court will rule on the state's motion. (p.551:155).

Parker v. District of Columbia Board of Education, C.A. 79-1878, 3 EHLR 551:267.

Action by a 12-year old severely learning disabled child with emotional problems related to her learning disabilities, seeking an injunction to cause defendant school board to pay the cost of her educational placement at a private school. Plaintiffs allege that defendants consistently failed to provide her with an individualized education program (I.E.P.), which recognized plaintiff's emotional problems. During this time period plaintiff was placed by her parents in a private school where she was making progress. A hearing officer had twice ruled that the school's proposed I.E.P.for the student was inadequate. Action brought pursuant to P.L. 94-142, 20 U.S.C. §1401 et seq., Section 504 of the Rehabilitation Act of 1973, Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.D.C. 1972), and the 5th Amendment seeking a declaratory judgment, injunctive relief and monetary damages. Rulings (in granting plaintiff's motion for a preliminary injunction): (1) In order to prevail on their motion for a preliminary injunction, the plaintiffs must make the following showings: that they are likely to succeed on the merits; that they will be irreparably injured if the requested relief is not granted; that the issuance of the injunction will not cause substantial harm to the defendants; that the injunction is not against public interest. (p.551:268) (2) Since defendants' failure to provide an appropriate I.E.P. is in direct violation of 20 U.S.C. §1415, it appears that plaintiff is likely to succeed on the merits. (p.551:268) (3) "Defendants' argument that the parents could have had an adequate I.E.P. had they reported for a conference . . .is without merit. Such a conference would have occurred approximately one week before the beginning of the school term and would not have allowed the parents to exercise their right to a hearing in the event they objected to the proposal." (p.551:268) (4) Since plaintiff had made progress at KLS and defendants have failed to provide her with an appropriate I.E.P. or education elsewhere, to prevent plaintiff from continuing at KLS would cause irreparable injury to plaintiff. (p.551:269) (5) Plaintiff's continued placement at KLS would not cause defendants injury.(p.551:269) (6) The public interest would be served by plaintiff's continued placement at KLS as she was making progress at that school. (p.551:269).

Plitt v. Madden, 413 A.2d 867 (Supreme Ct., Delaware,1980).

Action by parents of a learning disabled child, whom the parents removed from public school and placed in private school, seeking to recover three years of private school tuition costs from the local school district and the State Board of Education of Delaware. Plaintiff, who is a learning disabilities specialist, had placed her child in a private program for the summer, and, pleased with her progress, wished her to remain there rather than return to public school. Defendant school board refused to approve payment of tuition costs, relying in part upon the findings of the school's Disability Learning Committee which had concluded that plaintiff's daughter did not qualify as learning disabled. After receiving information from plaintiff's independent educational evaluation, the school did recommend a program for plaintiff's child, which plaintiff rejected. Plaintiff appealed up through the state level, the State Board agreeing with the original recommendation of public school placement with supplemental services. Plaintiff therefore brought this action alleging a denial of (state and federal) equal protection on the grounds that defendants had failed to provide plaintiff's child with an appropriate education. Rulings: (1) Under federal law, which must override state law concepts if they are less broad, equal protection within the field of education requires the provision of equal educational opportunity to all, including the disabled or disadvantaged. (pp. 870-71). (2) Pursuant to 14 Del.Code. §1703(f), private placement is to be at public expense only if the public school of the student determined that the student could not be appropriately educated in a public program and the private school had an approved program for the student. (p.871) (3) "Merely because an education program may be imperfect does not render it constitutionally invalid." (p.871) (4) Had the school district lacked or failed to offer a learning disability program for the child, a claim for denial of equal protection might be appropriate. However, such is not the case here and there is, therefore, no equal protection violation. (p.872) (5) Only if plaintiff tried a public school program and it proved to be inadequate is recourse permitted under 14 Del.Code §1703(f) to a private school. (6) Failure to convene a committee for the purpose of considering a child's qualification for learning disability assistance until three months after the mother requested an evaluation and failure to give notice of the meeting constituted a denial of due process. As a result, tuition reimbursement may be appropriate for the first year of the private placement, but only of the trial court so determines after more thorough findings of fact. (pp. 872-73).

Schayer v. Ambach, 424 N.Y.S.2d 105 (Supreme Ct., Albany Cty., 1980)

Action by parents of an allegedly handicapped child seeking reimbursement for tuition and other related expenses incurred while sending their child to a residential boarding school. Plaintiffs' child was hospitalized in 1974 and his doctors advised his parents that he suffered a serious risk of suicide if he was not removed from his home environment. Plaintiffs placed child at a private preparatory boarding school for normal children at a cost of less than $5,000 per year. The local school district informed plaintiffs that the school was not on the list of the New York State Department of Education and therefore no tuition assistance could be provided. Furthermore, the Committee on the Handicapped of the local school district notified the child's parents that the child did not possess a handicapping condition sufficient to warrant the provision of publicly-funded special educational services. Plaintiffs challenged this decision and requested a hearing which resulted in a determination that petitioner does have a handicapping condition. However, the hearing officer held that the parents did not have a right to reimbursement since they had placed their child in a non-approved school. On appeal to the New York Commissioner of Education, the hearing officer's decision was upheld. Plaintiffs then brought this action. Rulings (in denying relief):(1) Pursuant to subdivision 2 of Section 4401 of the Education Law,contracts with schools which have not been approved by the Commissioner may not be executed. (p.106) (2) "That the petitioner may not be able to attend a school that may be particularly suited to his needs because such school is not an approved school, does not render the ruling arbitrary, capricious, or unreasonable; the construction given relevant education statutes and regulations by respondent if not irrational or unreasonable should be upheld. (p.106).

Matter of Scott K., 400 N.Y.S.2d 289 (Family Ct., New York County, 1977)

Action by parents of handicapped children who require residential school placement for twelve months a year, seeking an order under §236 of the Family Court Act requiring payment by the proper governmental authority of the cost of tuition and maintenance of these children during the months of July and August. Rulings: (1) Pursuant to §4405(1)(b) and §4406 of the New York Education Law, parents are not required to make a contribution toward the cost of maintenance of their child in residential placement. (p.290) (2) Similarly, §236 of the Family Court Act states that costs shall be a charge upon the county or the city of New York and there is no provision requiring parental contribution towards these costs. (p.290) (3) The absence of a provision requiring parental contribution as is found in other sections of the act (for example pursuant to §232, parental contributions must be made for the cost of medical services), mandates the conclusion that contribution is not to be exacted from the parents of handicapped children in residential placement, whether the placement is for the normal ten month school year or for a full twelve months. (p.290) (4) Ostensibly, P.L. 94-142 (20 U.S.C. §§1401 *et seq.*) which requires the provision of special education and related services to be provided at no cost to parents (see 34 C.F.R. §300.302) applies to a residentially placed handicapped child for a full twelve months a year if the child's needs require such placement (p.291).

State v. Stecher, 390 A.2d 408 (Superior Court of Conn.,1977)

Action by the State of Connecticut against the father of a child in a state institution (High Meadows) for support of said child (Robert). The father impleaded town as third party defendant, claiming that the town was obligated to pay a proportionate share of the costs of the education of the child. The local school district had recommended placement for Robert at the state institution; his parents consented. The defendant agreed to pay the per capita cost of support provided by statute. The trial court found 60 percent of the total per capita cost billed to the parent was reimbursable by the town since 60 percent of the cost of Robert's treatment at the institution was attributable to the cost of his special education. This appeal by the state challenges that holding. Rulings: (1) The right to a free public elementary and secondary education is recognized by article 8, Section 1 of the Connecticut constitution. (p.410) (2) "[T]he right to a free public education is not measured by the physical or intellectual ability of the child. Therefore, in construing the statutes applicable to special education we must bear in mind that any construction which imposes a special charge for such education might impair the child's constitutional right to a free public education." (p.410) (3) The state and town of New Canaan's argument that High Meadows does not qualify as a special educational institution because it is under the jurisdiction of the state department of mental health and not the state board of education is without merit. "There is nothing in the special education statutes: General Statutes §§10-76a-10-76j; which limits special education programs to those given in institutions devoted exclusively to education." (p.411) (4) "[A]ny special education given at a state institution to a child of elementary or secondary school age must be free." (p.411) (5) "To qualify a witness as an expert it must be shown that he has peculiar knowledge or experience which renders his opinion based on that knowledge or experience on aid to the trier." (p.411) (6) In order to prevail against the town of New Canaan it must appear the enforceable rights exist in the plaintiff against it. The town's liability arises only after action taken by the board of education either under statutory mandate or statutorily vested discretion. (p.412) (7) Since there is no indication that the school authorities agreed to pay the State of Connecticut for the placement of the child at High Meadows nor agreed to reimburse the defendant for any portion of the costs of that placement, the necessary condition precedent to liability of the town has not been met.

Summit School, Inc. v. Commonwealth of Pennsylvania Department of Education, Pa. Cmnwlth 402 A.2d 1142 (1979)

Mandamus proceeding brought by private school seeking to compel the Pennsylvania Department of Education to approve the school's special education program for socially and emotionally disturbed and learning disabled children. The school alleges that the Department of Education is obligated to evaluate its application for approved private school status pursuant to Sections 1372(3) and 1376(c) and Regulation 171.23(a) of the Pennsylvania Code which provide that a school district will assure accessibility to special education programs (Section 1372(3)) and that a school district will pay 25% of the cost of tuition and maintenance for a socially and emotionally disturbed child who is in a school "under the supervision of, subject to the review of approv[al] by the Department of Education" (Section 1376(c)). Rulings (in denying mandamus): (1) "There is no specific language in the Public School Code which requires the Department of Education to act upon applications for approved status. (p.1145) (2) There can be no such duty inferred from the legislative intent. (p. 1145) (3) "Absent a duty in the Department to use private schools for the education of exceptional children, or at least language to be found encouraging this use, it is illogical to assume that the legislature intended to compel the Department to process all applications submitted by these schools for 'approved' status and give a determination of eligibility for tuition reimbursement status regardless of the Commonwealth's need for such additional schools." (p.1145) (4) "Further, the impracticable administrative and supervisory burdens which such duty would impose upon the Department forbids its indulgence." (p.1145)

Sundheimer v. Kolb, (N.Y. Supreme Ct., Bronx Cty., 3/22/77) 3 EHLR 551:432

Class action brought by parents of mentally retarded persons who have not been institutionalized alleging the unconstitutionality of certain statutes (primarily applicable to the Willowbrook problem) which provide financial aid and other assistance to parents of mentally retarded persons who have been institutionalized but not to the parents of persons who have not been institutionalized. Plaintiffs allege that defendants' Family Care Program, which names individuals as family caretakers to care for formerly institutionalized mentally retarded persons and reimburses them for the cost of such care and Chapters 620 and 621 of the Laws of 1974, which provide for state reimbursement to each public welfare district for public assistance and care of the mentally disabled deny plaintiffs equal protection of the laws. Plaintiffs also allege that the denial of these family care benefits to them violates the state's constitutional obligation to provide the needy with care and support. Rulings (in certifying class action and granting plaintiffs' motion for partial summary judgment): (1) "Plaintiffs' situation of need and their children's handicaps are identical to those of the parents permitted. . .to be providers under the Family Care program. The application of the Family Care Program appears to create two different groupings of individuals without rational basis. Insofar as monies are thereby provided to one group and denied to the other, the constitutional attack upon the application of these statutes appears to be meritorius." (p.551:434) (2) Class certification is granted, the class being "those persons within New York City who are parents or legal guardians and are not eligible to become Family Care providers according to the applications of the Family Care program.' (p.551:435)

In the Matter of Tracy Ann Cox, No. H4721/75, Family Ct., Queens Cty., N.Y., 4/8/76

Action by parent requesting that City of New York pay maintenance costs for keeping his daughter in a center for handicapped children. The center was not as yet approved by the state as an educational institution, but was approved by the state's Department of Mental Hygiene. The child, eight and one-half years old, functions at the level of a child 13 to 14 months of age. Rulings (in favor ot parent): (1) The center provides the child with all of the care and education required for a person with her handicap. (p. 1) (2) Not all children can be "educated" in the traditional sense; some children require more basic training in such self-help skills as eating, dressing, and speech therapy. (p. 2) (3) Lack of certification does not bar state reimbursement for a child's education at an institution when there is a finding that the child is being furnished proper care and education. (p. 2)

Welsch v. Commonwealth of Penn. Department of Ed.,
400 A.2d 234 (Commonwealth Ct. of PA. 1979).

Action by parents of a socially and emotionally disturbed child seeking the Department of Education's approval of an out-of-state placement and grant tuition reimbursement for the placement of their child in a private residential school in Connecticut. The petitioners on their own initiative enrolled their child in Connecticut while the local school district was seeking appropriate placement for the child in an approved private residential school in Pennsylvania. The petitioners believing the Connecticut school is the appropriate placement will not make the child available for evaluation by or placement in a private school in Pennsylvania. Appellants allege that they have a right to reimbursement for the Connecticut placement pursuant to 24 P.S. §13-1376. Rulings: (1) "Section 1376 of the Code, 24 P.S. §13-1376 which provides for tuition reimbursement speaks only of pupils enrolled with the approval of the Department of Education.'" (p.235) (2) Since Penn. Law (specifically 24 P.S. §13-1372(3) and Regulations (22 Pa.Code §13.12) "provide that the Secretary of Education may approve out-of-state placement only if there is no appropriate program of placement in the Commonwealth, and since the appellants will not agree to any placement other than to the Connecticut school or to make their child available so that it may be ascertained whether there is an appropriate program of in-state placement, the contention that the Secretary of Education should nevertheless approve the out-of-state placement and tuition reimbursement by the Commonwealth is patently unsound." (p.235).

William C. v. Board of Education of the City of Chicago,
390 N.E.2d 479 (App.Ct., Ill., 1979) 3 EHLR 551:228

Action by two trainable mentally handicapped children to require either the Board of Education of the City of Chicago (the Board) or the Special Education Cooperative of South Cook County (Speed) to pay for the cost of the plaintiffs' special education. Both plaintiffs attended private special education facilities prior to being recommended for residential placement within the Speed school district, a joint agreement special education school district. Speed refused to enroll both plaintiffs on the grounds that the Board refused to reimburse Speed for the cost of plaintiffs' educations. Defendants' refusal to pay resulted in the denial of educational services to both plaintiffs for a school year. Action brought pursuant to Ill. Rev. Stat. 1975 ch.122, par. 14-1.0 *et seq.* and P.L. 94-142 (U.S.C. §1401 *et seq.*) against both the Board and Speed in the alternative, for failure to provide a free education. After a ruling by the trial court that Speed should educate the children at the Board's cost, the Board brings this appeal. Rulings (in affirming):

(1) The decision in School District No. 153 v. School District No. 154 1/2 370 N.E.2d 22 (Ill. 1977) in which the court held a handicapped child is a legal resident of the school district in which his/her parents reside, and that school district should provide for his/her education, is controlling here. (p.482-3) (2) Where there is no evidence to indicate the parents have relinquished custody or control over their child who is in a residential special education facility, the school district of the parents' residence is responsible for the child's education. (p.483) (3) Determination of the school district responsible for providing the child with an education pursuant to Illinois statute §14-4.01 is based on the child's legal residence and not the child's physical presence within a school district, (p.483) (4) Application of Section 14-7.01 which provides that if a child must attend another school district for his special education, "the school district in which he resides shall grant the proper permit, provide any necessary transportation, and pay to the school district maintaining the special educational facilities the per capita cost of educating such children," is not limited to those situations in which a child travels to another school district only for the day and returns home at night. "To provide that a school district should have to pay for day students who attend a class or school in another district but not reimburse districts educating their residents as residential students is inconsistent with the policy decision of the legislature to require local school district financing of special education." (p.483-4) (5) Section 14-7.03 which provides in part that "if children from the orphanages, children's homes, foster family homes, other state agencies, or state residential units for children attend classes for handicapped children in which the school district is a participating member of a joint agreement. . . then reimbursement shall be paid to eligible districts in accordance with section 14-12.01," "does not warrant the conclusion that the state has decided to pay for children who have responsible school districts to finance their education simply because they happen to live in the above-mentioned facilities." (p.484).

See Frankel §140A; Age §140C.2; Cox §140C.2; DeNunzio §140C.2; Howard S. §140C.2; Krawitz §140C.2; Lopez §140C.2; Matthews §140C.2; Windward School §140C.2; Matter of Frank §140C.5; Matter of George Jones §140C.5; Mahoney §140C.5; In re Richard K. §140C.5; Schneps §140C.5; Casement §140C.6; Gary B. §140C.6; Mitchell §140C.6; Univ. Texas §140C.6; Matter of Young §140C.6; Johnson §140D; Grymes §140E; Smith §140E; Stempel §140E; Moran §140F.3.

140E Procedural Protections

Brown v. District of Columbia Board of Education,
(D.D.C. 9/13/78) 3 EHLR 551:101

Action by five visually and hearing impaired children alleging denial of due process when defendant Board of Education transferred them without notice or hearing from a special education program in a regular school building to a program in a separate special education school building. Defendants argue that the transfer did not change the children's educational placement but rather placed their entire class in a school which could provide additional services such as vocational and pre-vocational training, adaptive physical education, fulltime services of a registered nurse and other health aides, and a swimming pool. Defendants allege that notice and due process are therefore not required as there is no change in educational placement. Plaintiffs bring this action pursuant to P.L. 94-142 (20 U.S.C. §1415(e)(4) and Section 504 of the Rehabilitation Act of 1973 seeking a preliminary and permanent injunction. Rulings (in denying plaintiffs' motion for relief): (1) In order to prevail plaintiffs must show that without relief they will be irreparably injured. (p.551:103) (2) In deciding whether to grant plaintiffs' motion for injunctive relief the court must also consider whether the plaintiffs have made a strong showing that they are likely to prevail on the merits of the case, whether the relief requested would substantially harm other parties interested in the proceedings and whether the issuance of an injunction would be in the public interest. (p.551:103). (3) Pursuant to 20 U.S.C. §1415 any proposal or refusal to change "the identification, evaluation, or educational placement" of a handicapped child must be accompanied with notice and an impartial due process hearing. (p.551:103) (4) The legislative history of P.L. 94-142 fails to define "educational placement." Therefore, "in the absence of any legislative definition to guide its decision, the court must look to the language of the Act and regulations for an indication of what the words mean. The regulations seem to use the term "placement" as a substitute for "program" and the Act appears to contemplate use of the due process mechanism only for changes that affect the form of educational instructions being provided to a handicapped child." Therefore, defendants' transfer of plaintiffs to a special education school where they will receive the same education program is not a change in placement and notice and due process hearings are not required. (p.551:103) (5) "[I]f a change in placement were deemed to occur every time a decision was made that affected the educational experience of a handicapped child, a local board could be prevented from implementing changes in personnel, supportive services, or even class size unless they undertook the procedural requirements of notice and hearing." (p.551:103-04) (6) Plaintiffs' parents may challenge their children's I.E.P.s and have the right to participate in the development of revised programs which incorporate the services offered at the new placement. (p.551:104). (7) Defendants have not violated the "least restrictive environment" requirement of P.L. 94-142 in removing plaintiffs from interaction with nonhandicapped children as plaintiffs were in need of services which could not be provided at the public elementary school. (p.551:104)

Campochiaro v. Califano, Civil No. H-78-64, D.Conn.,
Ruling on Motion for Preliminary Injunction and
Motion to Dismiss, 5/18/78
(Clearinghouse #23,909B)

Action challenging as inconsistent with federal law the statutory procedural due process protections employed by Connecticut in administering the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq. Plaintiffs contend that the Connecticut scheme does not provide for an impartial administrative hearing officer as required by the federal act. Rulings (in granting in part and denying in part plaintiffs' request for preliminary injunctive relief): (1) The federal act, at 20 U.S.C. §1415 (e)(2) and (4), gives concurrent jurisdiction to state and federal district courts to entertain de novo appeals from state boards of education concerning the placement of allegedly handicapped children. (pp. 3-4) (2) Although the substantive provisions of the act do not have to be implemented until September 1, 1978, the procedural protections of the act became effective October 1, 1977; therefore, the present action is not premature. (p. 5) (3) Since Connecticut's administrative procedures do not conform with federal law, exhaustion of administrative remedies, which is normally mandatory, is not required since it would be ineffective. (p. 4) (4) The Connecticut administrative procedural due process scheme is defective since the local board of education itself conducts the initial hearing and any review thereof is conducted by a panel selected by the State Department of Education and some panel members may be SEA employees. (p. 4) (5) The use of state or local board employees contravenes the requirement of 20 U.S.C. §1415(b)(2) and any argument that the members of the local board of education are not "employees" of the board is refuted by the legislative history of the statute (see 1975 U.S. Code Cong. and Adm. News 1480, 1502). (p. 7) (6) The fact that someone is paid for serving as a hearing officer does not disqualify that person so long as that is the only function he or she performs for the state or local board. (p. 9) (7) The state's hearing procedures are also defective in the amount of time given to local and state boards to reach a decision after a hearing (see 45 C.F.R. §121a.512). (p. 8) (8) The court cannot order an interim placement for plaintiff since federal law specifically requires that, unless the parties agree to the contrary, the child must remain in his or her current educational placement during the pendency of any proceedings conducted pursuant to the act. (p. 10) (9) Preliminary injunctive relief is appropriate here since irreparable injury results from the fact that "each day that a handicapped child fails to receive appropriate educational opportunities serves to further retard his intellectual and emotional development." (p. 9) (10) Action is dismissed with respect to defendant Califano, Secretary of Health, Education and Welfare. The appropriate defendant would be the Commissioner of Education, who administers the act. However, plaintiffs have no standing to request the enjoining of disbursement to the state of federal funds under the act. (p. 10)

Concerned Parents and Citizens for the Continuing Education at Malcolm X (P.S.79) v. The New York City Board of Education,
629 F.2d 751 (C.A.2, 1980) 3 EHLR 552:147

Appeal of a district court decision holding that the New York City Board of Education had violated P.L. 94-142 by transferring approximately 185 handicapped students from P.S. 79, which was closing due to budget problems to other schools without providing prior notice and a hearing to the parents of such children. The district court also ordered that the Board provide "those curricular and extracurricular programs and related services which were available to plaintiff children at P.S. 79." The Board appeals this decision, alleging that the circumstances of the case did not require notice and hearing to each student transferred. Rulings (in reversing): (1) "[T]he term 'educational placement' [found at 20 U.S.C. §1415(b)(1)(C)] refers only to the general types of educational program in which the child is placed. So construed, the prior notice and hearing requirements of §1415(b) would not be triggered by a decision, such as that made by the Board in this case, to transfer the special education classes at one regular school to other regular schools in the same district." (p. 754) (2) The legislative history of P.L. 94-142 indicates that "the reference to 'educational placement' in §1415(b)(1)(C) would appear to refer to the general educational program in which a child who is correctly identified as handicapped is enrolled, rather than mere variations in the program itself, which the district court apparently believed could constitute a change in placement." (p. 754) (3) "The regulations implementing the Act also interpret the term 'placement' to mean only the general program of education. . .the reference to a 'change' in 'educational placement' in 'educational placement' in §1415(b)(1)(C) would therefore apparently encompass only decisions to transfer a child from one type of program to another." (p.754) (4) Strong policy considerations support a restrictive interpretation of the meaning of "educational placement" in §1415(b)(1)(C). The broad interpretation given by the district court would impair the Board's ability to implement even minor discretionary changes within the educational programs provided for its students, discourage the Board from introducing new activities or programs, and finally deny the educational agency any workable standard for assessing whether a particular decision might constitute a change in placement. (pp. 755) (5) "Thus. . .[t]he term 'educational placement' refers only to the general educational program in which the handicapped child is placed and not to the various adjustments in that program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary." (p. 756) (6) "Our conclusion does not mean, however, that there are no constraints on the power of school boards to close schools and transfer students; we merely hold that under the facts of this case §1415(b) did not act as such a constraint." (p. 756) (7) This decision does not have "the parents of transferred handicapped students without means under the Act to redress the alleged deficiencies in the educational programs of the children at their new locations." (p. 756)

Denunzio v. Board of Education of the City School
District of the City of New York, 396 N.Y.S. 2d 236
(S.Ct., App.Div., 1977)

Appeal from dismissal of petitioners' article 78 proceeding challenging the budgetary cut in educational services provided for handicapped students during the 1976-1977 school year. Such cuts in educational services were apparently accomplished in disregard of the relatively new provisions of Article 89 of the Education Law which provides due process procedures for persons aggrieved by changes in educational procedures. Rulings (in affirming): (1) The passage of time would appear to moot the matter, but the school program designed for handicapped students during the 1976-1977 school year was not in compliance with procedural safeguards provided by law. (237) (2) Respondents have undertaken to fully comply with all applicable statutes and regulations concerning the education of handicapped children; they represent that they are prepared to implement Article 89, to adhere to all procedural and substantive requirements of applicable statutes and regulations, and to assure handicapped students appropriate placements in the educational program. (237) (3) The Commissioner of Education has granted a variance to respondents to use media instruction in place of personalized instruction previously used as part of a complete homebound educational program; the court defers to such expertise since educational policy is entrusted by statutory and Constitutional provisions to school administrators. (237) (4) Cuts in programs for the handicapped appear more drastic than those implemented in schools for regular students, but an equal protection claim cannot rest merely on the percentage of budgetary cuts in the program (237)

Eberle v. Board of Public Education of the School
District of Pittsburgh, PA., 444 F.Supp 41
(D.Penn., 1977)

Action brought under the judicial review provisions of §615 of the Education for All Handicapped Children Act, 20 U.S.C. §1415, on behalf of a hearing impaired student who contests his school district's transfer of him from a private to a public school. Plaintiff had pursued all state and local administrative reviews. Rulings (in dismissing for lack of jurisdiction): (1) To determine whether the procedural due process protections contained in 20 U.S.C. §1415 should be "retrospectively" applied, the Act must be examined in light of the allegations in the complaint. (43) (2) The procedural due process protections instituted by the State of Pennsylvania in conformity with the requirements of the Act were not instituted as a result of the Act but were instead the result of earlier litigation which itself prompted passage of the Act. (44) (3) The requirements of §1415 cannot become effective prior to the availability of the funding (October 1, 1977) provided under the Act, particularly where Congress indicated that the procedural safeguards were established as a condition of a state's eligibility to receive funding. (44) (4) The due process procedures, prior to the date on which funding became available, were not procedures "pursuant to" §1415 and, since jurisdiction of the federal district court is only over complaints made "pursuant to" §1415, the court has no jurisdiction over the action. (44)

Grymes v. State Board of Education, Civil Action No. 79-55
(D.Del. 1980) 3 EHLR 552:279.

Action for full tuition reimbursement for handicapped student in private placement. In addition, plaintiff alleges that he was not provided proper due process protections during the administrative hearing of the matter. Rulings (in granting relief): (1) Section 1415(d) of the Education for All Handicapped Children Act (20 U.S.C. §§1401 et seq.) guarantees to any party to a due process hearing "the right to written findings of fact and decisions." "It would strip this provision of meaning to sanction a hearing officer's determination which makes no assessment of the handicapped child's needs or of the capacity of the district's programs to meet those needs." (p.5) (2) Since the administrative determination in this case did not include any findings or analysis relating to the nature of plaintiff's handicapping conditions and needs or the aspects of the educational programs offered which the hearing officer felt were appropriate, the decision did not satisfy the requirements of P.L. 94-142. (pp.4-5) (3) The hearing officer also erred in his allocation of the burden of proof by placing the burden on the parents. Under the regulations of the state department of education, the burden of sustaining school district action or refusal to act, rests upon the district. (p.6) (4) The use of state department of education employees as state level administrative review officers violates P.L. 94-142 (20 U.S.C. §1415(c)). (p.6) (5) Ordinarily, errors of this type during an administrative proceeding would require a remand to the administrative agency. However, because P.L. 94-142 allows a reviewing court, not only to review the administrative record, but also to hear additional evidence and to reach a decision based on a preponderance of all the evidence, it is obvious that the court can reach an independent decision. (p.8) (6) A school district is responsible for providing the funding for a child's private placement until all due process proceedings and appeals have been completed since a suspension of funding would constitute a change in placement prohibited under 20 U.S.C. §1415(3)(3). (pp.8-9) (7) Since plaintiff student has now been placed in a public program and the only matter at issue is tuition reimbursement for the previous school year, during which time the administrative reviews were proceeding, the reimbursement must be paid since it was for the time period during administrative review. (pp.9-11) (8) A decision on the appropriateness of plaintiff's educational placement is moot. (p.10)

Menegas v. Elizabeth O'Hara Walsh School, No. 27 56 38
(Superior Court of Conn., District of Danbury, 12/4/80)

Action by the parents of an autistic child against the defendant private school seeking to prevent the school from continuing to refuse to retain their child in its school program. The child had been placed at the private school in 1978 after a determination by the Board of Education of the City of Danbury that that was the appropriate placement for her needs. The costs of the placement are borne by the Board of Education of the City of Danbury which is reimbursed in part by federal money (under P.L. 94-142, 20 U.S.C. §§1401 et seq.) via the State Board of Education. Plaintiff child is being denied placement at the Elizabeth O'Hara Walsh School for the school term beginning in September, 1980. The Danbury Board of Education and the State of Connecticut have been cited as necessary parties by the court. However, both the State of Connecticut and Danbury Board of Education have filed motions to dismiss the action against them on the grounds of governmental immunity. Rulings (for plaintiffs): (1) Defendants' motion for dismissal due to sovereign immunity is denied on the grounds that "the rights sought to be enforced are granted by federal statutes which incorporate procedures and rights set forth in the Federal Civil Rights Act and are constitutional in nature." (p.3) (2) "That the United States Congress intended to create a federal statutory right to education for the handicapped is indisputable." (p.3(a)). "The act is, therefore, not merely a funding provision as the defendants have suggested. Further, the detail of requirements set out in this federal statute take precedence over any local custom or statute." (p.4) (3) The legislative history of Section 504 indicates that it was the intent of Congress to provide a remedy analogous to 42 U.S.C. §1983. An injunction is therefore an appropriate remedy for enforcing the rights in question. (p.5) (4) "[A]n injunction in this case would not impair the operations of the state government." (p.5) (5) P.L. 94-142 and §504 provide due process protections and require that while a challenge to a placement is being made, the status quo should prevail with the child

P-1 v. Shedd, Civil No. H-78-58, D.Conn. Declaratory Ruling, 6/15/79 (see Bulletin, p. 727,892) Clearinghouse #23,385

The court considers one issue upon which the parties were unable to agree in their consent decree (see Bulletin, p.892). Plaintiffs challenge the use of the district's "Central Pupil Appraisal Team" (CPAT), a committee in the central administrative offices of the school district which reviews the decisions of any local school placement team (I.E.P. team) whenever the parents disagree with that team's decision or whenever that team recommends placement in an institution outside the school district. Plaintiffs contend that the CPAT is an unnecessary additional administrative step, that use of the CPAT results in denial of participation of all required participants in individualized education program (I.E.P.) meeting (under 45 C.F.R. §121a.344 et seq.), and that the mechanism simply served as a means for the local school district to conserve money by insuring that few students are placed in expensive out-of-district institutions. Rulings (in granting plaintiff's request for declaratory ruling): (1) "The Handicapped Act envisions only two kinds of procedures and the CPAT does not conform with either one. The first procedure is the meeting to develop the child's I.E.P. The second is an impartial administrative review, at either the local or state board level, to review the placement recommended by the first meeting. . ." the CPAT is neither. (p.4) (2) The CPAT cannot be characterized as an I.E.P. meeting because it fails to include all the appropriate people. 45 C.F.R. §121a.344. The CPAT cannot qualify as an administrative review because it is comprised of employees of the local board of education and is thus not an impartial hearing board within the meaning of 20 U.S.C. §1415(b)(2), (p.5) (3) A local school system is not prohibited from using a central authority for making or assisting in decisions about out-of-district placement. However, to do so, the CPAT must function as an integral part of an I.E.P. team which includes all required participants and may not serve as an administrative review board. (pp. 6-7)

Parham v. J.R., 99 S.Ct. 2493 (1979)

Action by children in a Georgia state mental hospital who were recommended for admission by their parents. Plaintiffs allege the Georgia mental health statute, which allows commitment by a parent without a due process hearing before a judicial officer, to be unconstitutional. The child may then be admitted temporarily for "observation and diagnosis." If the superintendent of the hospital finds "evidence of mental illness," the child may be admitted. The superintendent is under an obligation to discharge the child once hospitalization is no longer necessary or desirable. The district court held that Georgia's scheme for voluntary commitment of minors was unconstitutional in that it constituted a severe deprivation of liberty. The court held that in order to satisfy due process, a hearing before an impartial tribunal was necessary. Rulings (in reversing and remanding): (1) In order to test state procedures challenged under a due process claim, the following interests must be balanced--the private interest which is affected by the official action, the possibility of a wrongful deprivation of the private interest, the value of additional procedural safeguards; the government's interest, including the fiscal and administrative burdens that additional safeguards would bring. (pp. 2502-3). See Matthews v. E~~l~~dridge, 424 U.S. 319, 335 (1976); Smith v. OFFER, 431 U.S. 816, 847-848 (1977) (2) Since the child's interest is linked with the parents' interests and obligations, the private interest involved here is a combination of the child's and parents' concerns. (p.2503) (3) While cases of child abuse and neglect exist, "historically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . .The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." (p.2504) (4) "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from parents to some agency or officer of the state." (p.2504) (5) Parents are not given an absolute right to commit their children to state mental institutions. The superintendent of each hospital must make an independent determination on commitment. (p.2505) (6) If hearings are required for every child, psychiatrists and other mental health specialists will have less time to spend with their patients, providing for their care. (p.2506) (7) In order to insure that a child is not erroneously committed a complete inquiry by a neutral factfinder must be made of the child's background; a periodic review of the need for commitment is also necessary. This will protect against due process violations and erroneous admissions. There is no need for judicial officers who are not as qualified as psychiatrists to make such decisions. (p.2506) (8) Due process is satisfied by "informal, traditional medical investigative techniques." (p.2507) (9) A formalized hearing would interfere with the parent-child relationship, causing the parent and child to become adversaries. This confrontation may effect the long range successful treatment of the patient. (p.2508) (10) Mental health professionals are adequately trained to determine if a parent is applying for admission merely to free him/herself of the responsibility of the child. There is no need for a judicial determination. (p.2509) (11) Georgia's mental health procedures comply with due process. However, on remand the district court is free to consider any individual claims alleging denial of due process. (p.2511) (12) On remand the district court is free to consider whether Georgia's procedures satisfy due process when the child is a ward of the state and application for admission is made by the state rather than by the natural parents. (p.2512).

Note: In a concurring opinion Justice Stewart emphasizes that children whose parents have made decisions on their behalf to commit them to a state hospital cannot allege a deprivation of liberty by the state. The presumption that the parent is acting in the child's best interests is grounded in the common law. Children with unfit parents are protected by Georgia's child abuse statutes. (pp.2514-5)

Robert M. v. Benton, Civil No. C 79-4007 (N.D. Iowa, 1979)

Action brought pursuant to 20 U.S.C. §1401 et seq., 29 U.S.C. §794, 42 U.S.C. §1983, Due Process Clause and §670-12.1 et seq. of the Iowa Administrative Code challenging the impartiality of a due process hearing held before the State Superintendent of Public Instruction for purposes of determining child's educational placement. Plaintiff alleges this hearing held pursuant to Chapter 290 of the Iowa Code was in violation of 20 U.S.C. §1415(b)(2) and 45 C.F.R. §121a.507(a)(1) in that these provisions provide that the hearing is not to be conducted by an employee of or agency involved in the care or education of the child. Plaintiff alleges defendant state superintendent is an employee involved in the education or care of the child. Rulings (in sustaining plaintiffs' motion for summary judgment): (1) Regardless of whether defendant is an employee of the Department of Public Instruction (the state educational agency) of the State Board of Public Instruction (the state board which supervises the state agency), he is connected with Iowa education and therefore "has a personal and professional interest in the case." (p.5) (2) While defendant may perform a good job as a hearing officer, he cannot make a disinterested inquiry and give the "appearance of a fair hearing and due process to all concerned." (p.5) (3) The use of "employee" in 20 U.S.C. §1415(b)(2) indicates the State Superintendent of Public Instruction cannot serve as an impartial hearing officer. (4) 45 C.F.R. §121a.507(a)(1) does not conflict with 45 C.F.R. §121a.506(b) which requires the hearing must be conducted by the State educational agency. . .in that "must be conducted by" does "not mean supply a hearing officer connected with the state educational agency, but means supply a hearing officer, period." (p.7).

Note: This case is on appeal before the Eighth Circuit.

Robert M. v. Benton, 634 F.2d 1139 (C.A.8, 1980)
3 EHLR 552:159

Appeal of district court holding that the Iowa Superintendent of Public Instruction is so connected with Iowa education that he would have a personal and professional interest in a special education case and can therefore not serve as an impartial hearing officer as required by 20 U.S.C. §1415(b)(2) and 45 C.F.R. §121a.507(a)(1). The district court granted plaintiff's motion for partial summary judgment holding that the Superintendent must be considered an employee of Iowa's state educational agency and therefore the hearing over which he presided violated the statute by failing to provide due process. Superintendent Benton appeals this decision. Rulings (in remanding): (1) Since several claims in the appellee's complaint have not been adjudicated and the district court has not made the express determination required for entry of a partial final judgment under Fed.R.Civ.P. 54(b), the U.S. Court of Appeals does not appear to have jurisdiction under 28 U.S.C. §1291. (p.551:160). (2) However, if the district court granted what amounts to an adjudication against Superintendent Benton, the court may have jurisdiction of the appeal under 28 U.S.C. §1292(a)(1). Thus, due to the ambiguous nature of the district court's proceedings, it is necessary to remand this case so the district court can clarify its order. (p.551:160) (3) Since appellee is now enrolled in a special education class, the district court should also address and resolve whether this case is now moot. (p.551:160).

Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 99 S.Ct. 2523 (1979)

Action by children institutionalized at a state mental hospital alleging the unconstitutionality of the Pennsylvania mental health law (§201 Pa.Stat.Ann., tit. 50, §7201) in that it fails to provide for a formal advisory hearing before commitment to a mental hospital. The District Court held that the Pennsylvania statute is unconstitutional. The court held that in order to guarantee due process, before a child can be voluntarily admitted to a mental hospital by his/her parents, s/he must be provided with legal counsel, given a finding by an impartial tribunal based on clear and convincing evidence that the child is in need of institutional treatment and given a full hearing within two weeks of admission. This hearing should include the right to confront and cross examine witnesses. This action is an appeal of the District Court judgment. Rulings (in reversing and remanding): The requirements set out in the Pennsylvania statute are sufficient to meet the requirements of due process. The statute provides that a psychiatric examination by an independent team of mental health professionals must be conducted before a child is admitted, a full background history must be compiled on the child, and every child's condition must be reviewed at least every 30 days. These procedures are sufficient to meet the due process standard set forth in Parham v. J.R., 99 S.Ct. 2493 (1979)(p.2528).

Sherry v. New York State Education Dept, 479 F.Supp. 1328 (W.D.N.Y. 1979) 3 EHLR 551:519

Action for injunctive and declaratory relief seeking the reinstatement of plaintiff, a multiply handicapped fourteen year old girl, in her educational program at the N.Y. State School for the Blind from which she had been indefinitely suspended without due process, and seeking to require defendants to revise their procedures to comply with the procedural protections of the Education for All Handicapped Children Act, 20 U.S.C. §1415. Plaintiff was suspended when she began to engage in increasingly frequent self-abusive behavior and the school determined it did not have adequate resources to meet her needs. Rulings (denying defendants' motion to dismiss; granting in part plaintiff's motion for summary judgment): (1) This court has jurisdiction over plaintiff's claim based on the Handicapped Act under 20 U.S.C. §1415(e), where state defendants had not provided impartial hearing required by federal law. 20 U.S.C. §1415(b)(2)(c). (p.1333) (2) Jurisdiction exists over plaintiff's claim under §504 of the Rehabilitation Act of 1973, where administrative remedies can result in a cut-off of federal funds to recipient agencies but an individual has no immediate, effective way to vindicate her own rights. Since no meaningful administrative enforcement mechanism exists, neither exhaustion nor primary jurisdiction is applicable. (pp.1333-1334) (3) Where plaintiff's 42 U.S.C. §1983 claim that her due process rights under the Fourteenth Amendment were violated by her suspension is not frivolous, this court has jurisdiction under 28 U.S.C. §1343(3). (p.1334) (4) An issue becomes moot and no longer justiciable when, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interests to maintain the litigation. (p.1334) (5) Performance of the particular act sought to be enjoined may moot the issue of an injunction, but where there is a likelihood that the act complained of will be repeated, the issues remain justiciable and a declaratory judgment may be rendered to define the rights and obligations of the parties. The question is whether the allegedly wrongful behavior could not reasonably be expected to recur. (p.1334) (6) Despite plaintiff's reinstatement, the claim that her suspension from the state school violated the Handicapped Act, §504 of the Rehabilitation Act, and the due process and equal protection clauses of the Fourteenth Amendment is not moot. Plaintiff continues to seek injunctive and declaratory relief that the state's review procedures do not meet the requirements of 20 U.S.C. §1415. Given plaintiff's handicapping conditions, there is a significant likelihood that the problem could repeat itself and the right to review, if any, would again become an issue. Plaintiff has a continuing interest in having the court define the obligations and rights of the parties. (p.1335) (7) Where plaintiff only sought an injunction requiring the Olean City School District to provide her a free appropriate education and services pending her reinstatement at the state school for the blind, her claim against the school district is moot since she is reinstated. (p.1335) (8) The Handicapped Act assures all handicapped children of the availability of a free appropriate public education and related services to meet their unique needs; and 20 U.S.C. §1415 guarantees these children, their parents or guardians certain procedural rights. (p.1335) (9) During plaintiff's hospitalization, which followed her emergency suspension for having been dangerous to herself, and perhaps, for a short period thereafter, no change in her educational placement occurred by reason of the suspension. Thus, no agency hearing or other safeguards under the Handicapped Act were required. (p.1337) (10) When defendants indefinitely suspended plaintiff in response to her parent's request that she be reinstated at the School for the Blind, her educational placement was changed within the meaning of §1415, and in violation of the procedural safeguards of §1415. (p.1337) (11) Though state procedural safeguards may "substantially comply "with the requirements of the Handicapped Act it is not sufficient for state procedure fails to provide for an impartial hearing officer, or to allow a child to remain in place pending resolution of a complaint in violation of 20 U.S.C. §1415, with which state procedures must comport. (pp. 1337-1338) (12) The regulations promulgated under §504 of the Rehabilitation Act require a recipient agency to provide the supervisory staff necessary to allow a handicapped student to benefit from the services of that agency. (p.1339) (13) Plaintiff's indefinite suspension was unlawful under §504. Defendant's concern for her safety cannot be a substantial justification, for such concern could have been eliminated had defendants provided the necessary supervision as part of plaintiff's appropriate education program. (p.1339)

Smith v. Cumberland School Committee, No. 76-510
(D.R.I. May 29, 1979), 3 Mental Disability Law
Reporter 329

Action by a multi-handicapped boy and his parents to determine whether the local school committee or the Department of Mental Health is responsible for paying the expenses of the child's special education. Awaiting the Rhode Island Supreme Court decision on that issue before making its decision, the Rhode Island Federal District Court rules on the issue of whether employees of the department of education may be hearing officers at administrative hearings. Rulings (in granting defendants' motion for partial summary judgment): (1) While Congress clearly provided that education department employees are prohibited from conducting the initial hearings, there is no prohibition with regard to the appeals made from the initial hearing. (p.329) (2) 20 U.S.C. §1415(c), which applies to the standards used to review local decisions, does not disqualify department employees as hearing officers. (p.329) (3) R.I. Gen. Laws §8-10-3 does not confer exclusive jurisdiction on the family court for appeals from administrative agencies. Rather the family court has jurisdiction after review by the state education agency. (p.329)

Stemple v. Board of Education of Prince George's County,
464 F.Supp. 258 (D.Md. 1979)

Action by parents of a multi-handicapped child to recover the cost of tuition for child's education at a private institution. Plaintiffs placed their child in a private non-residential school for two and a half years (May 1976-June 1978), after which she returned to a special education program in the public schools. Plaintiff's request for reimbursement was denied by the county when administrative proceedings resulted in a finding that the county had offered an adequate program for the child which was rejected by the plaintiffs. This decision was affirmed by the Maryland State Department of Education, so plaintiffs bring this action to obtain review of the fairness of the administrative denial of tuition reimbursement. Plaintiffs allege that the administrative denial of tuition reimbursement was not based upon a preponderence of the evidence, that they unfairly bore the burden of persuasion throughout the proceedings and that at the state proceedings, the state wrongly introduced a report which the plaintiffs had no prior opportunity to examine. Action brought pursuant to Section 615 of the Education for All Handicapped Children Act (P.L. 94-142) and Section 504 of the Rehabilitation Act of 1973. Rulings (in granting defendants' motion to dismiss): (1) Plaintiffs are seeking reimbursement for a period prior to when P.L. 94-142 became effective. Since the benefits sought were not covered by EHCA funds, because the statute was not yet effective, the Act's procedural guarantees are not applicable. (p.260) (2) Defendants were, for the time in question, subject to the provisions of §504 since they were required to be in full compliance with that law since they were not entitled to the exemption embodied in 45 C.F.R. §84.33(d)(phase-in period for those not in compliance on effective date of §504 regulations) (pp.260-61, n.1) (3) The procedural safeguards required pursuant to Section 504 include only "notice," a right to inspect records, an impartial hearing with a right to representation by counsel and a review procedure." (see 45 C.F.R. Part 84) Proper allocation of the burden of proof in placement proceedings, which plaintiffs allege they were denied, is not a procedural safeguard. Therefore defendants have not violated Section 504. (p.261) (4) In light of the procedures which were afforded, the allocation of the burden of proof to parents and student did not deny them the "meaningful opportunity to be heard" which due process requires. (p.261) (5) Plaintiffs' contentions that the State Department of Education's action of reading into evidence a written statement on the appropriateness of the placement offered to the child in question was without authority as plaintiffs had no prior opportunity to examine it, is without merit as the Eleventh Amendment bars suits against a state by its own citizens. (p.262) (6) The Eleventh Amendment does not bar prospective injunctive relief against a state. However, plaintiffs are effectively seeking an award of damages as though they are challenging the procedural defects in the review of their request for reimbursement, they are ultimately seeking a recovery of money from the state. This is precluded by the Eleventh Amendment. See Edelman v. Jordan, 415 U.S. 651 (1974)(p.262) (7) As to the county defendants, the plaintiffs have cited no breach of a legal duty for which these defendants may be held liable. (p.263)

Stemple v. Board of Education of Prince George's County,
No. 79-1208 (C.A. 4, 1980)

Action by parents on behalf of their multiple handicapped child, to obtain reimbursement for the cost of tuition at a private institution. In this action, plaintiff appeals the dismissal of her complaint (see Stemple v. Board of Ed. of Prince George's County, 464 F.Supp. 258 (D.Md. 1979, , alleging that the district court was in error in ruling that §615 of the Education for All Handicapped Children Act was unavailable to permit judicial review of the state administrative proceedings. She further contends that retroactive application of §615 is proper; that the burden of proof as to the appropriateness of a child's education on the student's parents, violates federal law; and that the claim for tuition reimbursement is not barred by the Eleventh Amendment. Rulings (in affirming): (1) It is not necessary to decide any of these issues which plaintiff raises. As she has voluntarily returned to public school, "any contentions about the burden of proof in administrative proceedings or the effect of the Eleventh Amendment in the context of this case are real issues only to the extent that they affect her right to reimbursement." As plaintiff has no right to reimbursement there is no need to decide the issues she raises. (pp. 8-9) (2) "[T]he language of §615(e)(3) [20 U.S.C. §1415(e)(3)] creates a duty on the part of parents who avail themselves of the hearing and review provisions of §615 to keep their child in his current educational assignment while the hearing and review provisions are pending, absent agreement between them and the education authorities that some different arrangment be made. . .[This] negates any right on the part of parents, in violation of the duty and in the absence of agreement, to elect unilaterially to place their child in private school and recover the tuition costs thus incurred." (pp. 13-14) (3) "[S]ince there was a duty not to move plaintiff until a final decision, plaintiff is lacking in any right to recover tuition payments for her parents' unilateral decision to send her to a private school while she was seeking redress for the claimed violation of her rights." (p.15) (4) The duty to maintain the child in his/her present educational placement "arises as soon as school authorities make a decision as to identification, evaluation and placement of a handicapped child and continues until a decision not to contest it is reached or, if a contest ensues, until that contest is finally determined." Thus plaintiff's contention that §615(e)(3) does not apply to her situation because her parents decided to send her to private school before the administrative proceedings were invoked is without merit. (pp.15-16).

Tina A. v. Shedd, C.A. No. H-80-462, Complaint (8/80), Plaintiffs' Memorandum in Support of Their Motion for Preliminary Injunction (9/8/80); Plaintiffs' Memorandum in Support of Their Motion for Class Certification (9/8/80); Stipulation and Order (10/24/80)(D.Conn.) (Clearinghouse #29,972A-D)

Class action on behalf of all children in Connecticut between ages 3 and 21 who are wards of the state or whose parents or guardians are unknown or unavailable and who are or may be in need of special education. Complaint seeks declaratory and injunctive relief requiring defendants to appoint surrogate parents for the students to protect their rights in proceedings under P.L. 94-142 (20 U.S.C. §§1401 et seq.). Plaintiffs allege that, pursuant to 20 U.S.C. §1415(b)(1)(B) and 34 C.F.R. §300.514, they have a right to an independent and knowledgeable individual to act as a surrogate for their natural parents. Surrogates have been requested for the four named plaintiffs who are wards of the state and have parents who are mentally incapable of representing them. Requests for surrogates were made to the State Department of Education as required in Connecticut General Statutes section 10-94f-10-94j. Plaintiffs' requests were either ignored or, in one case, flatly denied. Plaintiffs therefore bring this action pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, P.L. 94-142 (20 U.S.C. §§1401 et seq.), and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). Plaintiffs also seek class certification. Rulings (in entering consent decree): (1) The defendants must, pursuant to state law, provide surrogate parents as defined by P.L. 94-142 to the named plaintiffs. (2) A subclass of children, aged 3 to 18 who are in need of special education and who are wards of the state or whose parents are unknown or unavailable as defined by Connecticut General Statute 10-94f, is certified. (3) Since this class may not include all eligible students, plaintiffs may reserve the right to request certification of additional subclasses at a later time.

Victoria L. v. District School Board of Lee County, Florida, Case No. 80-67-Civ Ft. M.D. (M.D.Fla.,11/17/70) 3 EHLR 552:265.

Action by 15 year old female with a specific learning disability (a deficit in her auditory attention span) against school district alleging a violation of 20 U.S.C. §1415(3) and its implementing regulation (34 C.F.R. §300.513(a)), which requires a child to remain in his/her present educational placement during the pendency of any administrative or judicial proceeding regarding a complaint. Plaintiff, after being determined a handicapped child, was placed in a special education program two hours a day with the remainder of the day spent in regular school classes. Plaintiff had numerous behavior difficulties which became increasingly worse culminating in her threatening another student with bodily injury. She was therefore expelled from the public school and recommended for placement at an Alternative Learning Center (a school for disruptive children). Plaintiff's parents, however, refused to consent to such placement. The school board therefore initiated an involuntary change of placement petition. Following administrative hearings, a final order was entered for plaintiff's placement at the hearing center. Plaintiff, however, refuses to attend the Learning Center and brings this action challenging the order. Plaintiff also alleges a denial of due process in that she was not permitted to have a lay advisor represent her at the administrative proceedings. Rulings (in denying plaintiff's motion): (1) Pursuant to 34 C.F.R. §§300.513 and 300.552 defendants are not prevented from using their normal procedures for dealing with children who are endangering themselves or others. (pp.552:266). (2) Plaintiff was not denied due process since even though her lay advisor was not permitted to serve as her direct representative, he was permitted to remain at the hearing and advise plaintiff's parents. (pp.552:266). (3) "The Court is unpersuaded that plaintiff can prevail on the merits of her claim that failure to grant injunctive relief will cause her irreparable harm [since] denial of preliminary injunctive relief does not deprive the minor plaintiff of her right to a contemporary educational opportunity under the Act. . ." (pp.552:266) (4) "[I]ssuance of injunctive relief would tend to undermine the disciplinary authority of defendants generally and expose the defendants and their other students to the possibility of continued disruption." (pp.552:267).

Vogel v. School Board of Montrose R-14 School District, 491 F.Supp. 989 (W.D.Mo. 1980).

Action by parents of two mentally retarded children alleging a denial of due process in the proceedings which recommended their children's removal from the local school district and placement at a state school. Plaintiffs claim that their children were excluded from the public school during the pendency of administrative review; one of the administrative hearings was conducted by the State Deputy Commissioner of Education rather than an impartial hearing officer; and that both local and State hearings were invalid since defendants failed to disclose evidence to plaintiff 5 days prior to the hearings as required by 34 C.F.R. §126.508(a)(3). Plaintiff children were enrolled in the local elementary school in September, 1977. On September 20, the Vogel children were tested by a State psychologist to obtain data for use in evaluation and placement. On September 26, plaintiffs were notified of their children's assignment to the Passaic State School for the Severely Handicapped. The letter notified plaintiffs of their right to appeal within 10 days. On September 27, plaintiffs objected to the assignment in part for the school's failure to develop IEPs for the children. On October 5, the school notified plaintiffs that the placement recommendation was only "tentative." An IEP was developed and on December 20,defendants again recommended placement at Passaic. On December 31, 1977, the plaintiffs requested a hearing on the placement. A temporary restraining order from a state court, entered on January 1, 1978, prohibited the exclusion of the Vogel children from the public school. A hearing was granted on February 28, 1978 but the hearing panel, not fully understanding their statutory duties, did not make a final decision but only recommended the areas in which they felt further review by the State Board of Education was merited. The State Board held that the placement and procedures followed were in accord with State law. Plaintiffs then brought this action pursuant to P.L. 94-142 (20 U.S.C. §1415(e) and Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). Rulings: (for plaintiffs): (1) Wherever a conflict exists between the procedural safeguards mandated by 20 U.S.C. §1415 and state law, the applicable federal law is controlling. (p.993) (2) The decision of the State Board of Education to classify the September 26, 1977, placement as "tentative" constituted an effective withdrawal of notice to the parents violated the provisions of 20 U.S.C. §1415(b)(1). (p.994) (3) The February 28, 1978, hearing was defective in that the hearing panel failed to make findings of fact and decisions to which plaintiffs were entitled pursuant to 20 U.S.C. §1415(d)(4) and Missouri state law. (4) At the State level, plaintiffs were denied their right to an impartial hearing officer pursuant to 20 U.S.C. §1415(c) and 34 C.F.R. §300.510 since the hearing officer was Deputy Commissioner of Education. The legislative history of P.L. 94-142 indicates that the requirement that no hearing may be conducted by an employee of the State or local agency involved in the education or care of the child serves to clarify the minimum standard of impartiality which applies to individuals conducting due process hearing. (p.995) (5) Defendants' argument that the State Board of Education is an agency not involved in the education or care of the child because, under state law, its duty is to "supervise instruction" is untenable and abrogates the intent of the language of Sections 1415(b)(2) and 1415(c) to insure impartial review. (p.995). (6) Plaintiffs' rights under 34 C.F.R. §300.508(a)(3) were violated since plaintiffs were not given five days prior notice of evidence to be introduced by defendants at the due process hearing. (p.996). (7) The intended exclusion of the Vogel children from public school placement prior to the completion of administrative review procedures constitutes a violation of their rights under 20 U.S.C. Section 1415(e)(3). This issue is moot however since State court injunctive relief was granted and the children were not excluded. (p.996) (8) This case is remanded to the State Board of Education for a new and proper hearing before an impartial hearing officer. (p.996).

See Jose P. §110; Jose P. §140B; Mattie T. §140B; Isgur §140B; North Carolina A.R.C. §140B; Seaman §140B; Concerned Parents §140C.1; Lora §140C.1; Allen §140C.2; Cox §140C.2; DeNunzio §140C.2; Howard S. §140C.2; Krawitz §140C.2; Mason §140C.2; Mills §140C.2; P-1 §140C.2; Savka §140C.2; Windward School §140C.2; Mrs. A.J. §140C.4; Blue §140C.4; Doe v. Koger §140C.4; Doe v. Maher §140C.4; Doe v. School No. 40 §140C.4; E.M. §140C.4; Laster §140C.4; S-1 §140C.4; Southeast Warren §140C.4; Levy §140C.6; Gargani §140D; Grynes §140D; Johnson §140D; Plitt §140D; Luis R. §140F.1; Mark T. §140F.1; Medley §140F.1; Crawford §140F.3; Monahan §140F.3; Matter of Pautz §140F.3.

Doe v. New York University, 442 F.Supp. 522 (S.D.N.Y., 1978)

Action pursuant to Section 504 of the Rehabilitation Act, 29 U.S.C. 794, seeking to require plaintiff's readmission to medical school. Plaintiff took a leave of absence in January 1976, due to a mental disability. She maintains that as a result of psychiatric treatment she has regained sufficient emotional stablity to return to school. Ruling (in denying a temporary restraining order and preliminary relief): (1) "[T]he most authoritative court to analyze the issue whether a private right exists under section 504 concluded that when such administrative machinery did come into being, any private right under the statute would be subject to the requirement that such administrative remedies must be exhausted before a plaintiff can obtain judicial review of his complaint." Citing Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (C.A. 7, 1977) (Bulletin, p. 411). HEW having promulgated regulations establishing administrative remedies, it is now appropriate to require plaintiff to exhaust those remedies. "[I]t is simply too early to find this specific administrative remedy inadequate." (523-24) (2) The central issues will be whether plaintiff is "handicapped" and whether she is "otherwise qualified" to attend medical school. "[I]t is not unreasonable to conclude that HEW could bring a greater degree of flexibility and expertise to bear on these issues. Of course, if HEW does not or cannot provide an effective remedy, a decision to bypass the administrative machinery would rest on a substantial ground." (524) (3) The court declines to follow Crawford v. University of North Carolina, 440 F.Supp. 1047 (M.D.N.C., 1977)(Bulletin, p. 625, this issue), where the court issued but stayed a preliminary injunction pending the filing of an HEW complaint. Here, defendants have made "a strong showing" of possible harm to patients, with whom plaintiff would have contact, and plaintiff is enrolled in "a degree program" at Harvard University. (524)

Doe v. Anrig, 500 F.Supp. 802 (D.Mass. 1980)

Plaintiffs seek review of administrative ruling rendered by Massachusetts Department of Education's Bureau of Special Education Appeals. At issue is the appropriateness of the school district's proposed I.E.P.s for three separate school years. Defendants moved to dismiss and for summary judgment for failure to exhaust administrative remedies. Plaintiff had been enrolled in the public schools but, beginning with the 1977-78 school year, he was enrolled in a private school when his parents determined it would be more suitable than the program being offered by the school district. The parents rejected the I.E.P.s offered by the district for the 1978-79 and 1979-80 school years. On administrative appeal to the Bureau, a decision in favor of the school district was recommended; thereafter, the parents filed this action. Defendants assert that plaintiffs were required to obtain an additional administrative review by the State Advisory Committee before seeking judicial review. Rulings (in granting, in part, motions to dismiss): (1) The court lacks jurisdiction to hear claims concerning the 1977-78 I.E.P. since jurisdiction is afforded under 20 U.S.C. §1415 only when a party is aggrieved by the findings and decisions of the state administrative agency. Here, no action of the state agency was taken since plaintiffs never brought the matter to the state agency to review. (pp.804-05). (2) Public Law 94-142 assumes a state procedural scheme different from that embodied in the Massachusetts statute and regulations since, in Massachusetts, the state agency conducts an initial administrative hearing which is then subjected to a mandatory review by a separate arm of the same agency. The provisions of 20 U.S.C. §1415 presume that, where the initial due process hearing is conducted at the state level, judicial review would be the next step for an appeal. (pp.805-06). (3) Massachusetts and federal law also differ in that Massachusetts law makes no provision for an appeal to federal district court. (p.805) (4) There is a prima facie conflict between the state and federal laws. (p.807) (5) The legislative history for P.L. 94-142 indicates that Congress did not intend to require changes in existing arrangements where due process hearings are conducted at the state level rather than the local level and that, where an initial hearing was conducted at the state level, further state level review is unnecessary. It is not clear, however, that Congress intended to preclude two levels of state administrative review. (p.807). (6) There is a strong federal interest in assuring that any appellate review of an initial due process decision is full, fair, and independent and that there is no delay in the review process. (p.808) (7) Because the second tier of administrative hearings is conducted by the body which was actually constituted under 20 U.S.C. §1413(a)(12), it may not be an appropriate administrative hearing body. (pp.808-09). (8) Since the statutory issue in question is not easily resolvable, the U.S. Department of Education should join these proceedings. (p.810)

Harris v. Campbell, 472 F.Supp. 51 (E.D.Va. 1979)

Plaintiff, a seriously emotionally disturbed child, brings an action pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.), the Fourteenth Amendment, 42 U.S.C. 1983, Va.Code §22-17.3 et seq. and Va.Const. Article 8, §1, seeking declaratory and injunctive relief for defendants' failure to provide plaintiff with an appropriate education. Plaintiff had been expelled for violent misbehavior from his private school placement; after this dismissal plaintiff received homebound instruction. Defendants assert that plaintiff must first exhaust his administrative remedies before bringing the instant case. Plaintiff however contends that the education he is receiving is non-existent rather than merely inappropriate and therefore he should not have to proceed first through the administrative hearing process. Rulings: (in dismissing without prejudice plaintiff's claims): (1) Plaintiff's failure to exhaust his administrative remedies is dispositive at this stage. (p.53) (2) If plaintiff was not receiving any education whatsoever and that defendants would not take any steps to provide him with an appropriate education, defendants' violation of the Act would be clear [and] prior resort to administrative remedies would not be a prerequisite to bringing an action. . .in federal district court. (pp.53-54) (3) Exhaustion of administrative remedies is not required when to do so would be futile. (p.54) (4) In light of efforts to educate plaintiff, it cannot be established that defendants failed to or refused to provide plaintiff with a free appropriate public education; therefore, plaintiff must exhaust his hearing remedies under 20 U.S.C. §1415(e)(2)(P.L. 94-142) before maintaining an action in federal court. (p.54) (5) Providing plaintiff with permanent homebound instruction would be inconsistent with the recommendations of his placement team. However, homebound placement is appropriate during a short period while defendants search for an appropriate private school placement. (p.55) (6) The issue of whether defendants are now making an effort to place plaintiff in an appropriate program must be brought before the local and state agencies before review by the court. (p.55) (7) Also, "there is no basis for a claim before this court of discrimination against plaintiff due to his handicap (29 U.S.C. §794) or for a claim that plaintiff was denied equal protection of the laws until plaintiff has exhausted [administrative remedies]" (p.55) (8) Since all of plaintiff's state claims have been dismissed, there is no basis for federal pendant jurisdiction over the state claims. (p.55)

Jones v. Califano, 576 F.2d 12 (2nd Cir. 1978)

Plaintiffs' complaint, suing for allegedly illegal methods for computing retroactive supplementary security income (SSI) payments, was dismissed for failure to exhaust administrative remedies as required by 42 U.S.C. §405(g). The district court held that exhaustion was particularly appropriate in this action as other SSI claimants had recovered the relief sought by pursuing administrative remedies. Plaintiffs appeal. Rulings (in reversing and remanding): (1) Where eligible claimants are required to exhaust their administrative remedies individually even though the hearing panel consistently rules in their favor, the Secretary of H.E.W. is requiring individual exhaustion when the result is a foregone conclusion. (p.17) (2) The federal court has jurisdiction only under 42 U.S.C. §405(g), which assumes as a condition for judicial review that the hearing determination was adverse to the claimant. However, it makes no provision for review of determinations favorable to the complainant but which the Secretary refuses to implement on a class-wide basis. (p.18) (3) Reliance by the Secretary on an alleged (but in fact non-existent) state "policy" inconsistent with the federal statute raises colorable constitutional claims under the Supremacy Clause. (p.18) (4) To find no federal court jurisdiction would mean that each individual would have to separately exhaust administrative remedies and, if the hearing panel continues to rule in favor of claimants, that there would be two inconsistent standards for claimants; one for those who seek administrative review and one for those who do not. In addition, there would never be an opportunity to obtain judicial review of the Secretary's practice. (p.19) (5) "To require each claimant to pursue his individual administrative remedy is to vindicate no legitimate agency interest when the only disputed issue is one of statutory construction. In this unusual case where a statutory interpretation can be universally applied to all eligible claimants, an exception to case-by-case exhaustion is appropriate." (pp.20-21) (6) "Judicial review cannot be entirely foreclosed by the fortuity of a termination of the individual grievance. (p.20) (7) "It [is] appropriate to imply a [constructive waiver by the Secretary] of the exhaustion requirement when, as in this case, there is a stalemate defying judicial review." (p.20) (8) Such a waiver is implied in the limited circumstances in which there is: an erroneous reliance on state practice or policy; the circumstances evade review; a violation of the Supremacy Clause is implied; and there are at least colorable constitutional violations of due process and equal protection. (p.20)

Kling v. *County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980)

Appellant was denied admission to defendant nursing school after it was determined that she is afflicted with Crohn's disease. Plaintiff was denied preliminary injunctive relief by the district court. *Rulings* (in reversing): (1) Plaintiff has a private right of action under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). (p.878) (2) The administrative remedies under Section 504 are inadequate to afford adequate individual remedies; therefore, there is no need to exhaust those remedies. (Citing *Cannon* v. *University of Chicago*), 441 U.S. 677 (1979), which reached a similar conclusion vis-a-vis Title IX, 20 U.S.C. §§1681 *et seq*., which prohibits discrimination on the basis of sex).(p.879) (3) A preliminary injunction was denied by the district court on the basis of an erroneous legal premise, i.e., that plaintiff was required to exhaust administrative remedies. (p.879) (4) It was also erroneous to deny the preliminary injunction since plaintiff is an "otherwise qualified" handicapped person (within the meaning of *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), who is capable of succeeding in nursing school without significant impairments due to her disease. (pp.879-880).

Luis R. v. *Canzonetti*, Civ. No. H79-181 (D.Conn. 6/14/79)

Plaintiff is a nine-year-old Puerto Rican boy with speech difficulty who was enrolled in a bilingual class in Connecticut and later placed in a special education class for the multi-handicapped. The plaintiff, following behavioral problems, was removed from school on two occasions and told not to return. Although he is currently in school, an evaluation team recommends home-bound instruction. Plaintiff claims that he has been denied educational evaluation, an I.E.P., and an appropriate education in violation of federal law (20 U.S.C. §§1401 *et seq*. and 29 U.S.C. §794) and that he has been excluded from school without being afforded procedural due process; he seeks injunctive and monetary relief. *Rulings* (denying plaintiff's motion for preliminary injunctions against defendant school and granting in part defendants' motion to dismiss: (1) "Plaintiff, by bringing this suit in federal court in the first instance, has short-circuited the speedy and effective administrative remedy which is available to him under Conn.Gen.Stat. §10-76h. . .The jurisdictional grant provided by the federal statute is expressly limited to appeals from the state hearing board." (pp.5,6) (2) State statute permits all of plaintiff's present complaints to be addressed at local and state administrative hearings. (p.8) (3) The federal handicapped act (P.L. 94-142) itself requires a hearing procedure which encompasses the widest possible range of complaints, 20 U.S.C. §1415(b)(1)(E). (4) Since plaintiff has made no attempt to exhaust his administrative remedies, his claims concerning denial of an appropriate I.E.P., denial of evaluation, and denial of appropriate education are dismissed for lack of jurisdiction. (p.9) (5) Section 504 does require schools to provide special services for the handicapped and there is a cause of action under that statute for handicapped youngsters who have not been afforded an appropriate education. (p.10) (6) Unlike P.L. 94-142, §504 does not provide a direct administrative appeal for a handicapped child dissatisfied with a placement. (p.11) (7) According to the standards set forth in *Cannon* v. *University of Chicago*, 99 S.Ct. 1946 (1979)(nondiscrimination on the basis of sex - Title IX), exhaustion is not required since: the federal government itself doesn't require exhaustion; the H.E.W. complaint procedure does not permit the complainant to be a party to the enforcement proceedings; the H.E.W. procedures will not necessarily provide any relief to the complainant; and H.E.W. has conceded that it lacks the resources to expeditiously process all the complaints it receives. (p.13) (8) Nonetheless, plaintiffs' §504 claims are premature at this time under the doctrine of primary jurisdiction, which is appropriate whenever a prior administrative hearing would be a material aid in resolving the dispute. (pp.13,14) (9) "The two primary purposes of the doctrine [of primary jurisdiction] - avoiding inconsistent rulings by the court and the administrative agency and deferring to a body with expertise when the question at issue is not within the conventional wisdom of a judge - would both be served by staying any action on the present suit until the plaintiff has brought this case to the local and state board of education hearing panels." (citing Stubbs v. Kline, 463 F.Supp. 110 (W.D.Pa. 1978). (p.15) (10) To permit plaintiff's claims that he was denied an appropriate special education which was provided to other children to "go forward under the guise of an equal protection claim would frustrate the purpose of the doctrine of primary jurisdiction" since this claim is the same as the P.L. 94-142 and §504 claims. (p.16) (11) Defendants' motion to dismiss plaintiff's claims that he was subjected to an unconstitutional disciplinary exclusion from school without procedural due process is denied. Education is a fundamental right in Connecticut (citing Horton v. Meskill, 172 Conn. 615 (1977)) and an exclusion from school for more than two months without any notice or hearing states a claim on which relief can be granted. (p.17) (12) In addition to considering the procedural protections required by Goss v. Lopez, 419 U.S. 565 (1974), school authorities considering the suspension or expulsion of a handicapped youngster must consider 20 U.S.C. §1415(e)(3), which prohibits any change in placement, absent an emergency, pending completion of the disciplinary process. (pp.17-18) (13) The plaintiff has made no showing of possible irreparable injury concerning this last, and only remaining, claim so no preliminary injunction may issue. (p.18)

Mark T. v. McDaniel, C.A. No. C79-222A (N.D.Ga. 6/26/79)
3 EHLR 551:214

Action by 16-year old emotionally disturbed boy with specific learning disabilities for defendants' failure to provide him with a free appropriate public education. Plaintiff alleges he is in need of an educational program and services which would extend beyond the traditional 180 days of schooling and that he is entitled to such under P.L. 94-142 (20 U.S.C. §794), the Fourteenth Amendment, 42 U.S.C., §1983, and the Adequate Program for Education in Georgia, Ga.Code.Ann. 632-601a et seq. Defendants move to dismiss for failure to exhaust administrative remedies and obtain a final state board of education determination. Pursuant to Georgia's 1979 State Plan for special education under P.L. 94-142, plaintiffs waived optional mediation of their dispute with the local school district and obtained a hearing before a regional hearing officer. The officer's decision was unfavorable and the federal court action was filed although defendants allege plaintiffs had a right to an administrative review by the State Board of Education. Rulings (in denying motion to dismiss or stay the proceedings): (1) "If at the time this suit was filed there were administrative remedies available to the plaintiffs, then the determination from which plaintiffs now seek relief was not final and defendants' motion should be granted." (p.551:214). (2) Pursuant to state statute (Ga.Code Ann. 32-910) an appeal to the State Board of Education is required from a decision of a 'a county, city, or other independent board of education' acting as a tribunal for the purpose of hearing and determining any matter of local controversy in reference to the construction or administration of the school law. However, contrary to defendants' argument, this is inapplicable to this case as the decision to be reviewed was rendered by a hearing officer rather than a board of education. (p.551:214). (3) Plaintiffs have exhausted all administrative remedies in accordance with the state plan in effect when their claim was brought (which specified that the decision of a Regional Hearing Officer will be binding on all parties). (p.551:241). (4) The hearing officer's decision was a final administrative determination. (p.551:215).

Note: Plaintiffs did not challenge on due process grounds Georgia's hearing procedures. After federal action was initiated but before this order was entered, the State Plan was amended to provide that the regional hearing officer's decision would be a "non-final" decision to be reviewed by the local school board and appealed to the state board of education. Such a scheme presents probable due process violations under both P.L. 94-142 and §504 (see Policy Interpretation).

This case was tried on the merits of plaintiffs' year-round schooling claims in May, 1980. No decision has been entered at this time.

Medley v. Ginsberg, C.A. No. 78-2099 CH (S.D.W.Va. 6/10/80)

Class action on behalf of all mentally retarded individuals under age twenty-three who have been allegedly deprived of their constitutional and statutory rights due to the state of West Virginia's failure to provide them with adequate social and educational care due to their unnecessary placement in institutions. Plaintiffs allege that proper treatment would be placement in foster homes or community based facilities in their home communities, rather than institutionalization. Action brought pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, (42 U.S.C. §6001-6081); P.L. 94-142 (20 U.S.C. §1401-1461), Section 504 of the Rehabilitation Act of 1973; and the Community Mental Health Center Act (42 U.S.C. §2689-2689aa) seeking monetary damages and injunctive and declaratory relief. Plaintiffs also allege deprivation of rights under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution as well as Chapters 16, 27, and 49 of the West Virginia Code. Rulings (in denying defendants' motion for summary judgment): (1) Plaintiffs have stated a private cause of action for federal statutory deprivations (under P.L. 94-142, §504 and the DD Act) pursuant to the remedy created by 42 U.S.C. §1983. (2) The Supremacy Clause alone does not provide a right secured by the Constitution in the nature of "equal rights" or "civil rights" as those terms are used in 28 U.S.C. §1343 (citing Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). (p.7) (3) Pursuant to Blue v. Craig, 505 F.2d 830 (4th Cir. 1974), "Section 1983 is to be literally construed to the end that a federal statute conferring a right, privilege or immunity is deemed to give rise to a cause of action under Section 1983, if that section's other requirements are also satisfied." Therefore, "a litigant can state a cause of action pursuant to section 1983 for the deprivation of a right conferred by a federal statute which does not satisfy the requirements of Section 1983's jurisdictional counterpart, Section 1343. If an individual alleges the deprivation of a right conferred by the Constitution or a federal statute which confers "equal" or "civil" rights, the individual may in addition to stating a claim under Section 1983, premise jurisdiction on Section 1343(3) or (4)" (pp.9-10) (4) While further development is necessary before passing on the constitutional claims, it is clear that plaintiffs have raised significant constitutional questions. (p.12) (5) If §1343 jurisdiction exists over federal constitutional claims alleged pursuant to §1983, jurisdiction over pendant federal statutory claims may be maintained without establishing an independent jurisdictional basis. (p.13) (6) Plaintiffs here assert federal statutory claims which do not focus on the incongruity of a state statute or regulation with its federal counterpart, but instead question the legitimacy of the state's institutionalization of plaintiffs in light of the federal statutes on which plaintiffs rely. (p.15) (7) Section 1983 provides a remedy for the deprivation of federal statutory rights created by P.L. 94-142, §504, and the DD Act. (p.15) (8) Plaintiffs may assert a claim under the Community Mental Health Centers Act under §1983. (p.15) (9) The alleged "administrative remedy" created by Section 6012 of the Developmentally Disabled Act requires creation of an advocacy agency to pursue the rights of the developmentally disabled as a prerequisite to the receipt of federal funds. This is clearly not an administrative remedy which plaintiffs are required to exhaust. (pp.18-19). (10) Exhaustion of administrative remedies is not required under Section 504. The administrative remedies promulgated by H.E.W. pursuant to Section 504 allow the Secretary of H.E.W., upon a finding of noncompliance, to terminate federal funding. This remedy is inapplicable to plaintiff's case. (pp.19-20, 22) (11) The decision in Cannon v. University of Chicago, 441 U.S. 677 (1979) in which the Court held that in a Title IX action individuals need not pursue the administrative procedures for the termination of federal funding, is applicable to administrative procedures under Section 504. (pp.20-21) (12) As no appropriate administrative remedies exist under the Community Mental Health Center Act, (12 U.S.C. §2689 et seq.), plaintiffs need not exhaust. (p.23) (13) Exhaustion of administrative remedies is not required as a prerequisite to §1983 actions. (p.24) (14) Even if exhaustion were required under §1983, it would not be appropriate here since no parent, guardian, or surrogate parent was present to exercise rights under P.L. 94-142. (p.26) (15) The legislative history of P.L. 94-142 indicates that each member of a class action is not required to exhaust the administrative remedies provided at 20 U.S.C. §1415. Therefore the exhaustion requirement of P.L. 94-142 is not applicable to plaintiffs' claims. (pp.26-27) (16) As there was state judicial or administrative proceeding pending at the time of this action, abstention (under Younger v. Harris, 401 U.S. 37 (1971 or Pullman v. Texas Railroad Commission, 312 U.S. 496 (1941)) by the federal court is not required. (pp.27-28)

Sessions v. Livingstone Parish School Board, 501 F.Supp. 251 (M.D.La. 1980)

Class action on behalf of students who allege their school district is not providing appropriate special education services under P.L. 94-142 (20 U.S.C. §§1401 et seq.). Previously, the school district had placed all of its handicapped students in a neighboring school district. When that district refused to continue the arrangement, the students were moved back to their local school district, but were placed in three classrooms in which there was no segregation on the basis of age or handicap. Presently before the court is defendants' motion to dismiss. Rulings (in granting motion to dismiss and dismissing with prejudice): (1) The intent and purpose of P.L. 94-142 is to encourage parties to seek administrative relief prior to obtaining judicial review; since plaintiffs failed to seek the administrative review provided for in the statute, they have failed to exhaust administrative remedies. (p.252) (2) "By providing for an explicit administrative procedure in the Act, Congress has expressed its apparent desire to resolve disputes regarding the education of handicapped children through state agencies trained to handle such matters and not through immediate federal judicial determination. Only when exhaustion would prove absolutely futile should the courts allow a plaintiff to circumvent the administrative process. (p.254). (3) Here, exhaustion would not be futile; the types of general allegations of inappropriate educational opportunities presented here are precisely the type of cases which Congress clearly intended to be initially resolved through state administrative proceedings. (p.254) (4) At issue here is whether or not the defendants have met the "appropriate" standard set forth in the Act, "this matter is best left to those Louisiana education officials who have been designated and trained to determine such matters. (p.254) (5) Retention of jurisdiction in a case where plaintiff has failed to exhaust administrative remedies is proper only if dismissal would cause the plaintiff irreparable harm; such is not the case here. (p.254).

United Cerebral Palsy of New York City, Inc. v. The Board of Education of the City School District of the City of New York, Civil No. 79 C 560 (E.D.N.Y. 8/10/79) 3 EHLR 551:251

Class action brought by United Cerebral Palsy of New York City, Inc. (U.C.P.) and individual named plaintiffs on behalf of a class of handicapped children living in New York City who are allegedly being denied a free appropriate public education due to defendants' failure to: identify, evaluate and place handicapped children in appropriate educational programs, develop adequate I.E.P.s for children and review the plans annually; provide adequate facilities, special educational instruction and related services for handicapped students placed in public school programs; and place handicapped children in the least restrictive environment. Plaintiffs further allege that defendants have been defraying payment for services which have been arranged by United Cerebral Palsy for children who are unable to attend public school. Finally, plaintiffs allege state defendants have failed to insure that the local district is providing free and appropriate education. Plaintiffs seek declaratory and injunctive relief directing defendants to locate and then evaluate and place handicapped students in appropriate educational programs with related services if needed. Plaintiffs also seek relief directing defendants to enter into reasonable consultative and contractual relationships with U.C.P. and to pay for educational services rendered by U.C.P. Plaintiffs further seek to have the court appoint a special master to monitor defendants' compliance with their legal obligations. Defendants have moved to dismiss the complaint on the grounds that U.C.P. lacks standing and has failed to state a federal claim upon which relief may be granted. Defendants also argue that plaintiffs have no private right of action because they have failed to exhaust their administrative remedies and failed to state a claim under the Fourteenth Amendment. Defendants also move that the claims alleging untimely evaluation, placement and reevaluation be consolidated with the claims alleged in Jose P. v. Ambach, also pending before the same court (see Bulletin, p. 866) Rulings: (1) The only means available to the United States Commissioner of Education, who is responsible for enforcing P.L. 94-142, and the Secretary of H.E.W., who is responsible for implementing Section 504, for effecting compliance with the statutory requirements of these two Acts is the suspension of federal financial assistance until the state or local education agency in question complies. As this is not a "'meaningful administrative enforcement mechanism,'" (citing Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977)), this suit may be maintained without prior resort to administrative proceedings. (p.551:253) (2) The state and local administrative procedures available have been pursued by other plaintiffs previously and to no avail (see Reid v. Board of Education, 453 F.2d 238 (2nd Cir. 1971)). (p.551:253) (3) In hearings before this court in Jose P, supra, counsel for state defendants indicated that the state would be unable to expeditiously process administrative complaints for all members of that plaintiff class. The same would presumably be true here, making the administrative remedy meaningless. (p.551:253) (4) The question of class action certification is deferred until the court receives the final report of the special master in Jose P., supra (a case before the court in which plaintiffs are seeking prompt evaluation and placement in special education classes, some, but not all, of the issues presented here).

See Adashunas §25; Pierce §5.5; Jose P. §110; Larry P. §140B; Riley §140B; Upshur §140B; Concerned Parents §140C.1; Lora §140C.1; Matter of Cordero §140C.2; Cox §140C.2; Howard S. §140C.2; Mills §140C.2; Pehowski §140C.2; Doe §140C.3; Doe v. Koger §140C.4; Stuart §140C.4; Gary B. §140C.6; Armstrong §140D; Boxall §140D; Gargani §140D; Johnson §140D; North §140D; Oster §140D; Campochiaro §140E; Sherry §140E; Camenisch §140F.2; Davis §140F.2; Patton §140F.4; Stubbs §140F.4.

140F.2 Private Right of Action

Camenisch v. University of Texas, 616 F.2d 127 (5th Cir 1980)

Appeal from order directing the University Texas, under the Rehabilitation Act of 1973 (29 U.S.C. §794), to procure and compensate a qualified interpreter to assist plaintiff, a deaf graduate student, in his classes during the 1978 school term. The district court conditioned its grant of preliminary relief on plaintiffs' filing an administrative complaint with D.H.E.W., and stayed the action pending an H.E.W. administrative determination on the merits. Rulings (affirming in part; vacating in part): (1) Appellate review of preliminary injunction orders is limited to an examination of whether the district court abused its discretion. (p.130) (2) The district court applied this Court's standards for the granting of preliminary relief as set forth in Canal Authority of the State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974). Four factors had to be met before issuance of a preliminary injunction: 1) irreparable harm to plaintiffs from failure to issue the injunction; 2) relative lack of harm to defendant from issuance of the injunction; 3) the public interest; and 4) probability that plaintiff will ultimately succeed on the merits. (p.130) (3) Plaintiff Camenisch would have suffered irreparable harm from a failure to issue the injunction. Without an interpreter, he would have been unable to complete the academic program in which he was enrolled, would not have been able to earn his degree, and might have lost his position as Acting Dean of Students. (p.130) (4) The question of the balance of hardship must be considered in the context of the requirement of posting a bond. The harm to defendant in granting the injunction was not great; the posting of a bond by plaintiff protected the defendant from any permanent harm. (p.130) (5) Since the defendant University provided plaintiff with an interpreter at its own expense under order of the district court and plaintiff posted a bond to repay appellants if he loses this appeal, despite plaintiff's having been graduated, a justiciable issue remains: whose responsibility is it to pay for this interpreter? Issues raised by an expired injunction are not moot if one party was required to post an injunction bond. (pp.130-131) (6) This Court agrees with the Cort analysis [Cort v. Ash, 422 U.S. 66 (1975)] of Section 504 of the Rehabilitation Act undertaken in Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1284-86 (7th Cir. 1977) finding an explicit congressional intent to create a private cause of action and finding such a right to be consistent with the purposes of the legislation. (p.131) (7) Judicial action under the Rehabilitation Act is not limited to post-administrative remedy judicial review. Issuance of the regulations under §504 preceded the Supreme Court's decision in Campbell v. Kruse, 434 U.S. 808 (1977) acknowledging judicial authority to entertain private suits for injunctive relief under §504 [434 U.S. at 808]; the administrative procedures adopted for enforcement of §504 do not constitute the "consolidated procedural enforcement regulations" contemplated in Lloyd, supra, 548 F.2d at 1286, n.29; the Supreme Court found a private cause of action under Title IX, Cannon v. University of Chicago, 441 U.S. 677 (1979), where the administrative procedures are identical to the procedures applied to complaints under §504. The regulations implementing §504 adopt the Title VI enforcement procedures, 45 C.F.R. §84.61, the same procedures used to enforce Title IX, despite plaintiff's having been graduated, a justiciable issue remains: whose responsibility is it to pay for this interpreter? Issues raised by an expired injunction are not moot if one party was required to post an injunction bond. (pp.130-131) (6) This Court agrees with the Cort analysis [Cort v. Ash, 422 U.S. 66 (1975)] of Section 504 of the Rehabilitation Act undertaken in Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1284-86 (7th Cir. 1977) finding an explicit congressional intent to create a private cause of action and finding such a right to be consistent with the purposes of the legislation. (p.131) (7) Judicial action under the Rehabilitation Act is not limited to post-administrative remedy judicial review. Issuance of the regulations under §504 preceded the Supreme Court's decision in Campbell v. Kruse, 434 U.S. 808 (1977) acknowledging judicial authority to entertain private suits for injunctive relief under §504 [434 U.S. at 808]; the administrative procedures adopted for enforcement of §504 do not constitute the "consolidated procedural enforcement regulations" contemplated in Lloyd, supra, 548 F.2d at 1286, n.29; the Supreme Court found a private cause of action under Title IX, Cannon v. University of Chicago, 441 U.S. 677 (1979), where the administrative procedures are identical to the procedures applied to complaints under §504. The regulations implementing §504 adopt the Title VI enforcement procedures, 45 C.F.R. §84.61, the same procedures used to enforce Title IX, 45 C.F.R. §86.71. Therefore, §504 creates a private individual right of action for equitable relief. (pp.131-133)(The Court expressly reserved judgment on whether §504 creates a private right of action in suits for damages. 616 F.2d at 132 n.10) (8)"Section 504 does not require a school to provide services to a handicapped individual for a program when the individual's handicap precludes him from ever realizing the principle benefits of the training." Appellee's claim can succeed on the merits, and is distinguishable from Southeastern Community College v. Davis, 442 U.S. 397 (1979), since he can perform well in his profession. (p.133) (9) The Court of Appeals cannot determine adequately both the existence and scope of a private cause of action under §504 without considering the extent to which that right of action is limited by an administrative exhaustion requirement. (p.134) (10) An appropriate exhaustion requirement would have to be waived in this case. The H.E.W. administrative procedures contain no administrative enforcement mechanism to provide the emergency relief sought here [45 C.F.R. §84.61, 80.8(a)(1979)]; where there is no adequate administrative procedure available, the exhaustion doctrine does not apply. Excessive administrative delays render H.E.W.'s administrative remedies inadequate to assist a complainant, thereby justifying a waiver of the exhaustion requirement. There is no need to exhaust an administrative remedy where the administrative agency has waived the requirement as the Office for Civil Rights has done in these sorts of cases. (p.134) (11) The H.E.W. administrative procedures do not provide the most appropriate or exclusive remedy to vindicate personal §504 rights. Because a plaintiff is under no obligation to pursue administrative remedies in §504 actions, that part of the district court's order conditioning its grant of preliminary relief on the requirement that plaintiff file an administrative complaint with H.E.W. is vacated. (p.134) (12) That private individual suits to enforce rights under §504 can be brought without resort to administrative remedies is consistent with H.E.W. enforcement efforts under the statute. (p.135) (13) Rights under §504 are protected by grant termination through the administrative process or by private suits to eliminate the proscribed discrimination. (p.136)

Crawford v. *University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C., 1977)(*Bulletin*, p. 422)

Ruling on motion for preliminary injunction filed by plaintiff, a deaf graduate student, claiming that his rights under 42 U.S.C. §1983 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, were being violated by defendant's refusal to provide him with interpreter services at university expense. Both parties filed objections to the Magistrate's Findings and Recommendation, under 28 U.S.C. §636, which recommended, *inter alia*, that a preliminary injunction issue on the condition that plaintiff initiate a complaint with HEW. *Rulings* (in adopting the Magistrate's Findings and Recommendation): (1) A serious question exists as to whether plaintiff has a private cause of action under the Rehabilitation Act, insofar as he seeks special benefits. (1056) (2) Plaintiff, in seeking to implement the Rehabilitation Act regulations, seeks a remedy enforceable by the administrative agency. Thus, requiring initial referral of this issue to HEW preserves the administrative machinery for effectuating the Act, enhances enforcement of the Act in that relief might encompass whole institutions, and may conserve judicial resources. (1057) (3) A handicapped individual can trigger and participate in a review of an institution's noncompliance with the Act (45 C.F.R. §§80.7; 81.23) -- a remedy "sufficient to create a substantial question calling for the staying of this action under the primary jurisdiction doctrine and requiring plaintiff to file a complaint with HEW." (1058) (4)Invoking the doctrine of primary jurisdiction does not moot the question whether plaintiff's motion for preliminary relief should issue to safeguard his rights from irreparable injury pending administrative determination. Where a party requests a mandatory injunction, the test is one of balancing the competing interests. (1058) (a) Though plaintiff has successfully pursued educational endeavors, he would be able to participate fully in class discussions with interpreter services. (b) The costs of such services would become a financial hardship to plaintiff, and the defendant would be better able to bear such costs. (1058-59) (5) Measuring irreparability of harm to plaintiff requires assessment of costs to defendant, and if the costs are minimal, the threatened injury may be more irreparable. (1059) Plaintiff has made a strong showing of having a probable right; defendants do not contest the right so much as how and when it is to be enforced. Defendant's real cost in providing an auxiliary aid to plaintiff might be zero. (1059) (6) The final factor, public interest, lies on the side of plaintiff. (1059) (a) The Rehabilitation Act regulations grant such right (at some time). (b) The mandatory injunctive relief enforces the federal statutes and regulations under which plaintiff has a probable right to protection. (1059)

Note: Plaintiff filed this action prior to the issuance of the regulations, which were issued three to four years after the enactment of the Rehabilitation Act, and thus had no opportunity to pursue administrative remedies.

Leary v. *Crapsey*, 566 F.2d 863 (C.A. 2, 1977)

Appeal of a district court decision which dismissed plaintiffs' class action for alleged failure to provide plaintiffs, who have severe physical handicaps, with an accessible bus transportation system. Action brought pursuant to the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq*. and Section 504 of the Rehabilitation Act of 1973. The district court dismissed on the grounds that defendants had not violated any federal statutory or constitutional provisions and that the action was barred by laches, primary jurisdiction, and failure to exhaust administrative remedies. *Rulings* (in reversing and remanding): (1) While the district court did not address the issue, defendants now concede that "mobility-handicapped persons, who are denied the use of a public transportation system, do have a private cause of action under Section 504" pursuant to *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977), and *Vanko* v. *Finley*, 440 F.Supp. 656 (N.D.Ohio 1977). This concession is "well-warranted." (p.865) (2) Due to defendants' presentation to the court of a myriad of information concerning the bus transportation system in question (including the applications by the defendants for federal funding and the subsequent administrative proceedings, the state of technology as to the manufacturing of buses designed to aid the physically handicapped and the efforts of defendants to meet federal requirements) this case is remanded to the district court for a "detailed examination of the local defendants' special efforts" in planning for needs of the handicapped. (pp.865-6)

Lloyd v. *The Regional Transportation Authority*,
548 F. 2d 1277 (7th Cir. 1977)

Class action on behalf of "mobility-disabled" persons filed under the Rehabilitation Act of 1973 (29 U.S.C. 701 *et seq*.), the Architectural Barriers Act of 1968 (42 U.S.C. 4151 and 4152), 42 U.S.C. 1983, and the Equal Protection clause. Plaintiffs seek injunctive relief to prevent Chicago-area transit authorities from receiving any new federally funded facilities unless such facilities will be accessible to all mobility-disabled persons and to require that all existing facilities be made accessible. Defendants were granted a motion to dismiss below on grounds that the statutes in question did not confer a private right of action. *Rulings* (in vacating and remanding): (1) "Because of the near identity of language in section 504 of the Rehabilitation Act of 1973 and section 601 of the Civil Rights Act of 1964, *Lau* v. *Nichols*, 414 U.S. 563 (which interpreted §601) is dispositive. Therefore, we hold that section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed." (p. 6) (2) The right to a private cause of action does exist under the standards set forth by *Cort* v. *Ash*, 422 U.S. 66 (1975): Plaintiffs are members of the class for whose special benefit the statute was enacted. (p. 14) Statements of legislative intent indicate Congressional contemplation of administrative proceedings separate from an independent cause of action in federal court but also make clear an intention to allow a private cause of action at some point. "When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts...[and] it is certainly consistent with the underlying purposes of the legislative scheme to imply such a remedy." (p. 17) Finally, this would not be the kind of remedy "traditionally relegated to state law in an area basically the concern of the States." (p. 18)

Sherer v. Waier, C.A. No. 77-0594-CVW-4, W.D.Mo., Complaint, Defendants' Rule 12 Motions, Plaintiffs' Memo in Opposition to Defendants' Rule 12 Motions, Memorandum and Order, 11/2/77

Action for declaratory and injunctive relief and money damages on behalf of spina bifida child who seeks to compel defendants to provide her with intermittant catheterization services, to remove her from a classroom for the orthopedically handicapped, to place her in a program for nonhandicapped children, and to provide her with compensatory damages. Plaintiff's claims are based upon Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the due process and equal protection clauses of the Fourteenth Amendment. Rulings (in granting the defendants' motion and dismissing without prejudice): (1) The case authority and legislative history of §504 do "lead to the conclusion urged by plaintiffs that handicapped individuals do possess a right created by §504. Important as that right may be, however, this Court does not agree that Congress intended it to be enforced by a private individual through a private civil action in the United States District Court without resort to the administrative machinery established by the Act and regulations." (p. 12) (2) A private cause of action is not appropriate here since there are no large numbers of handicapped persons involved, final regulations under the Act have been issued so there is effective administrative machinery to vindicate plaintiff's rights, and Congress did not specifically provide for a private right of action. (pp. 12-13) (3) "Although circumstances present in Lau, 414 U.S. 563 (1974), and Lloyd, 548 F.2d 1277 (7th Cir. 1977), may have warranted implying a right of action not specifically provided by Congress, those circumstances are not present in this case." (p. 13) (4) Imposition of injunctive relief is not appropriate because the case at hand is distinguishable from that in Crawford v. University of North Carolina, No. C-77-173-D (M.D.N.C.), where the U.S. Magistrate hearing the case recommended issuance of a preliminary injunction pending administrative outcomes because plaintiff there filed his suit prior to the issuance of the regulations and therefore had no opportunity to pursue administrative remedies. That situation does not exist here, where the case was filed after the effective date of the §504 regulations and where the provisions of the Education for Handicapped Children Act of 1975, 20 U.S.C. §1415(e)(3), clearly indicate that a child should remain in his or her present placement pending the outcome of administrative proceedings. (p. 14) (5) Plaintiffs may not assert a claim for damages under 42 U.S.C. §1983. A mother may not assert standing to assert deprivation of her child's rights as the basis of a claim for her own loss of income due to the need to personally conduct her child's catheterization. (p. 14) Also, defendants possess a qualified good-faith common law immunity from liability for damages arising from non-malicious actions arising from official duties (citing *Wood* v. *Strickland*, 420 U.S. 308, and *Strickland* v. *Inlow*, 519 F.2d 744 (C.A. 8, 1975). (6) "This Court declines to rule that defendants have created a 'suspect class' or that the right to education is constitutionally a 'fundamental right.'" (p. 16) There is no Constitutionally imposed duty to provide special education and there was no invidious discrimination against similarly situated individuals here. (p. 16)

United Handicapped Federation v. *Andre*, 558 F.2d 413
(C.A. 8, 1977)

Action by the United Handicapped Federation, the National Paraplegia Foundation, and six mobility handicapped individuals against the Metropolitan Transit Commission *et al*. for defendants' failure to make urban transit equipment which was purchased with federal financial aid fully accessible to handicapped persons. Action brought pursuant to the Fourteenth Amendment, Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Urban Mass. Transportation Act of 1964, the Federal-Aid Highway Amendments of 1974, the Department of Transportation and Related Agencies Appropriations Act of 1975, Minn.Stat.Ann. ch.256C, and 42 U.S.C. §§1983 and 1985(3). In the district court defendants' motion for summary judgment was granted, the court ruling that none of the statutes relied on by plaintiffs required every bus purchased with federal assistance be equipped to transport passengers in wheelchairs. Plaintiffs therefore bring this appeal. *Rulings* (in vacating and remanding): (1) The court adheres to the decision in *Lloyd* v. *Illinois Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), in which the court held Section 504 placed "affirmative duties on the mass public transportation systems in that region, and that plaintiffs (who were defined as a class of mobility disabled persons in the northeastern region of Illinois) had standing to seek declaratory and injunctive relief under §504 and regulations." (p.415) (2) Plaintiffs have standing to bring a private cause of action under §504. (p.415)

Note: A majority of the federal circuits have now found that a private right of action exists under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2nd Cir. 1977); *Davis* v. *Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978) rev'd on other grounds, 99 S.Ct. 2361 (1979); *Doe* v. *Colautti*, 454 F.Supp. 621 (D.Pa. 1978), *aff'd* 592 F.2d 704 (3rd Cir. 1979); *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980). *Contra* *Coleman* v. *Darden*, 595 F.2d 533 (10th Cir. 1979)

In addition, two United States Supreme Court decisions are relevant to the question of the viability of an implied private right of action under §504. In *Southeastern Community College* v. *Davis*, 99 S.Ct. 2361 (1979), the Supreme Court reaches the merits of a handicapped individual's claims under §504, after indicating that it is unnecessary to address the private cause of action issue. 99 S.Ct. at 2366, n.5. In *Cannon* v. *University of Chicago*, 99 S.Ct. 1946 (1979), the Supreme Court recognized the existence of an implied right of action under

Title IX of the Education Amendments of 1973 (20 U.S.C. §§1681 et seq.). Title IX and §504 are substantially similar statutes, both based upon Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d), for which a private right of action has been recognized. See 99 S.Ct. at 1957-58.

Finally, the Congress amended §504 in 1978 to provide an entitlement to remedies and attorneys fees for parties prevailing in litigation identical to those afforded under Title VI. 29 U.S.C. §794a. This may be construed as further evidence of Congressional intent to imply a private cause of action under §504.

Whitaker v. Board of Higher Education of the City of New York, C.A. No. 77 C 2258, E.D. N.Y., Memorandum of Decision and Order, 10/17/78

Action challenging defendants' decisions in refusing to grant plaintiff tenure and prohibiting him from using the title "Martin Luther King Distinguished Professor." The defendants are Brooklyn College, and several faculty members and administrators, as well as the Board of Higher Education. Plaintiff contends that defendants denied his due process rights and discriminated against him on the basis of a handicap, his admitted alcoholism, in violation of 29 U.S.C. §794. Plaintiff contends that his alcoholism is under control and has not interfered with successful completion of his assigned teaching duties. The dispute arose from the failure to afford plaintiff tenure in the Martin Luther King Professorship in the Department of Africana Studies, a position which he filled on a non-tenured basis for several years. Rulings (in denying defendants' motion to dismiss and plaintiff's motion for preliminary injunction): (1) Plaintiff has stated claims of denials of "liberty" and "property" interests sufficient to withstand motions to dismiss. (pp. 7-15) (2) Since the decision in Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (C.A. 7, 1977) (Bulletin, p. 411)," ... every circuit court which has considered the question, including our own, has sustained the existence of a private cause of action under section 504. See Davis v. Southeastern Community College, C.A. 77-1237 (4th Cir. March 28, 1978); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977)." (p. 17) (3) A different decision concerning a private right of action under Section 794 is not warranted by reason of HEW's promulgation, subsequent to Lloyd, of implementing regulations, a factor referred to in Lloyd. "[A] review of those regulations reveals that they do not provide an effective means whereby an individual may vindicate his rights under section 504." The court refers to HEW's having authority to cut off funding to an institution, but not to issue a binding directive to pay damages, or to require reinstatement. In addition, an affidavit from HEW states that HEW can not guarantee expeditious investigation of Section 794 complaints, due to a backlog. (pp. 16-20) (4) For the same reasons, the court rejects defendants' argument that exhaustion of the HEW administrative complaint procedure should be required. (pp. 20-21) (5) Plaintiff, who is employed in another university, has not established a basis for preliminary relief. (p. 22)

Zorick v. Tynes, 372 So.2d 133 (Fla.App. 1979)

Action by a blind physical education teacher against the Superintendent of Schools of Clay County, Florida for withdrawal of an offer for a position as a physical education teacher after learning plaintiff applicant is blind. School officials allege that they withdrew their offer to plaintiff on the belief that an unsighted person would be unable to supervise or teach elementary children's physical education activities. Action brought pursuant to Section 413.08(3), Florida statutes (1977), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and the Fourteenth Amendment. The Clay County Circuit Court held that Section 413.08 requires that the school district employ plaintiff on a conditional basis to allow him the opportunity to demonstrate whether he can perform the work of an elementary school physical education teacher. The court further held that as the Florida statute is applicable (§413.08(3)) to this case, Section 504 is not. Plaintiff appeals seeking back pay, attorneys fees, and a permanent injunction ordering his employment. Rulings (in affirming): (1) There is no due process violation under the Fourteenth Amendment as plaintiff's blindness "did not subject him to an irrebuttable presumption of incompetency as a classroom teacher of sighted students; he was refused a particular physical education job at a particular school because of job related requirements." (pp.137-8) (2) Plaintiff has no private right of action under Section 504 since there is no indication that the primary objective of the financial aid to the school district is to provide employment. (p.138) (3) Plaintiff is also denied a private right of action under Section 504 on the grounds that Florida state courts lack the power to require administrative reviews or assess their adequacies. Without power to require and enforce federal administrative remedies, the Florida state court will not handle a Section 504 claim. (p.139) (4) Even if plaintiff could bring a Section 504 claim, he would be unsuccessful in that he was not denied employment as a physical education instructor because he is blind but rather because he is unable to teach and supervise physical education. (p.140) (5) Section 504 does not prevent federal aid recipients from enforcing standards for physical capacities which are reasonably related to the work or program involved and defendants' actions here were neither arbitrary, capricious, or groundlessly discriminatory against the blind. (p.140) (6) Section 413.08(3) Florida Statutes (1977) which provides in part that "no school employer shall refuse employment to the blind on the basis of the disability alone unless it is shown that blindness prevents the satisfactory performance of the work involved," [emphasis added] requires that there should be no rebuttable presumption that the handicapped are unable to peform tasks. (p.141) (7) Pursuant to Florida law, an employer must allow an applicant an opportunity to show his capacities or incapabilities. He may not make an employment decision which rejects a blind applicant merely based on his own personal knowledge, experience and ingenuity. (p.141) (8) As plaintiff was denied by school officials the opportunity to "show" his capacities, "the circuit court was empowered at least to require a trial employment of sufficient length to dispel the misconceptions which tainted the original decision, replacing them with personalized knowledge of all relevant facts pertaining to Zorick's [plaintiff's] capacity or lack of it." (p.142) (9) The court is without power to order the payment of attorneys fees. (p.142)

Note: In the dissenting opinion it is stated that a blind person is clearly unable to teach physical education. The very nature of the profession requires sight in order that the teacher can see whether the student is behaving safely, hitting the baseball, making the basket, etc. The majority's decision sets a precedent which will allow a blind person an "on the job tryout" for any position, even those which obviously cannot be performed by one without sight (i.e. a traffic control officer, etc.)

See Adashunas §25; Larry P. §140B; Riley §140B; Upshur §140B; Halderman §140C.1; New York A.R.C. §140C.1; Pennhurst §140C.1; Howard S. §140C.2; Doe §140C.3; Kampmeier §140C.3; Boxall §140D; Guempel §140D; Doe v. NYU §140F.1; United Cerebral Palsy §140F.1; Barnes §140F.3; Crawford §140F.3; Gurmankin §140F.3; Meiner §140F.4; Patton §140F.4; Stubbs §140F.4.

140F.3 Standards of review

Barnes v. Converse College, C.A. No. 77-1116, D.So.Car., Opinion, 7/12/77 (Clearinghouse #21,941D)

Action by a deaf student, under §504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), seeking injunctive relief to require a private college to provide her with interpreter services for summer school classes. Plaintiff, herself a teacher of the deaf and blind, seeks to take courses required in order to maintain state teacher certification. Rulings (in favor of plaintiff): (1) The standard to be followed in granting preliminary injunctions is the "balance-of-hardship" test whereby the court determines (a) whether or not the plaintiff has a "probable" right under which she may recover and then (b) whether potential harm would be greater to plaintiff or to defendant if relief were granted. (p. 2) (2) Plaintiff is an "'otherwise handicapped individual' under §504 who can adequately perform in the academic course in which she wishes to enroll with the help of an interpreter." (p. 3) (3) Section 504 may be enforced by a private right-of-action. (pp. 4-5) (4) "Despite the obvious inequities inherent in the enforcement of this regulation," with no challenge to the validity of the statute or regulations, and with the obvious harm to plaintiff should she be excluded from the classes, injunction is granted. (pp. 5-7)

Breedon v. Maryland State Dept. of Education, 411 A.2d 1073 (Ct. of Special Appeals, Md., 1980)

Appeal by parents of a twenty-year old student with aphasia (a disability which makes language something he cannot readily comprehend), seeking review of the circuit court's upholding of an administrative hearing decision on the ground that the circuit court applied the wrong standard of review and that the Maryland State Department of Education bylaw which placed upon them the burden of proof of demonstrating the inappropriateness of the public school's suggested placement of a private school is unconstitutional as a deprivation of life, liberty, or property without due process of law. Plaintiffs have placed their child at the Children's Hearing and Speech Center at Children's Hospital in D.C. where during his seven year stay he made steady progress. When William became too old for this program, his parents sought another placement. The school district recommended that he be placed at Wheatly, a program for multiply handicapped children. Not satisfied with the placement, plaintiffs requested a due process hearing. The hearing panel found that placement at Wheatly was appropriate. The case went up through the circuit court level, where the circuit court allowed additional evidence from the defendants as to I.Q. scores creating a disparity between the information presented to the administrative review board and the court. The circuit court held that the disparity in the I.Q. data was not so significant to warrant the disturbance of the decision of the state board. The circuit court also failed to compare the programs at Wheatly and at Kennedy, the private school where plaintiffs had placed their child believing it to be the most appropriate placement. Plaintiffs appeal, the central issue on appeal being the power of the circuit court to receive additional evidence not offered before the administrative agency. Rulings:(1) The circuit court improperly received additional evidence in open court in violation of Md.Ann.Code, Art. 41 §255(d). This statute became effective on July 1, 1978 and applies to all actions which were pending on that date. (p.1079) (2) Under the new statute, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems appropriate. The burden is upon the party seeking to introduce the additional evidence to establish to the satisfaction of the court that the additional evidence is material and that there was good reason for failure to present it in the proceeding before the agency. (pp.1078-79). (3) The circuit court properly decided that additional evidence (the I.Q. statistics) should have been received, but the court improperly received the evidence. The case is therefore remanded to the circuit court for further proceedings consistent with this opinion and Md.Ann.Code 411 §255(d). (p.1081).

Cruz v. Collazo, 84 F.R.D. 307 (D.P.R. 1979)

Action on behalf of juveniles, institutionalized in custody of state department of social services, alleging inadequate rehabilitative treatment in violation of the Fourth, Fifth, Ninth and Fourteenth Amendments, P.L. 94-142 (20 U.S.C. §§1401 et seq.), §504 of the Rehabilitation Act (29 U.S.C. §794), and the Juvenile Justice and Delinquency Prevention Act (42 U.S.C. §5601 et seq.) Rulings (in retaining jurisdiction, granting class certification, and granting in part and denying in part motions to dismiss): (1) The legislative history of P.L. 94-142 shows that Congress considered the statute a civil rights act; therefore the court has jurisdiction, under 28 U.S.C. §1343(3) to hear claims of violations of that law. (p.311) (2) The provisions of 20 U.S.C. §1415(4) also constitute a grant of jurisdiction. (p.312) (3) There is a private cause of action under §504

(29 U.S.C. §794a) and no need to exhaust administrative remedies, so the doctrine of primary jurisdiction is inapplicable. (p.313) (4) While the Juvenile Justice and Deliquency Prevention Act embodies a requirement that juvenile justice services be delivered through "least restrictive alternatives," the statute does not define a liberty right, does not create a private cause of action, and does not create jurisdiction for the court under 28 U.S.C. §1343. (pp.313-14) (5) Class certification is appropriate here under the strict "standard of necessity," i.e., certification is necessary to assure the effectiveness of any eventual remedial decree. Here, without certification the case might easily be mooted out due to the high turnover of detainees in juvenile institutions.

Harris v. *Keane*, C.A. No. 76-323, D.V.Is., Amended Complaint (Clearinghouse #19,401A), Memorandum in Support of Class Action (Clearinghouse #19,401B), Order Approving Class, 10/27/76 (Clearinghouse #19,401F), Denial of Temporary Restraining Order, 9/15/76 (Clearinghouse #19,401D), Denial of Preliminary Injunction, 10/27/76 (Clearinghouse #19,401E)

Class action challenging exclusion of handicapped children from schools in St. Croix, Virgin Islands. The defendants are Virgin Island education officers, and HEW officials who have allegedly enforced inadequately pertinent federal laws. Plaintiffs allege, *inter alia*, violations of equal protection and due process rights, the Education for the Handicapped Act (20 U.S.C. §1411 *et seq*.), and 29 U.S.C. §794. The complaint seeks declaratory and injunctive relief and damages ($4000 per year out of school for each class member). *Rulings*: (1) (in certifying class) The Court approves a class of "all handicapped school age children in the Virgin Islands who have been excluded from a publicly supported education by defendants or otherwise deprived by defendants of a publicly supported education without written notice and an opportunity to be heard prior to any exclusion from public school, or change in educational placement." (2) (In denying temporary restraining order) While finding that the defendant local officials' efforts have been "insufficient" and that defendants "should devise and prepare for immediate implementation, a special education program designed to satisfy the requirement of the St. Croix population as a whole," the court denies relief because immediate placement in the regular program or "a hastily constructed special education program" would do "more harm than good...." (3) (In denying a preliminary injuction) The plaintiffs have established irreparable harm and a likelihood of success on the merits; however relief is denied because programs do not exist now and "it is...clear that an educational program which will meet the needs of these children can not be formulated in a hurried and haphazard manner."

Monahan v. *State of Nebraska*, 491 F.Supp. 1074 (D.Neb. 1980)

Action on behalf of two handicapped students on behalf of themselves and a class they seek to represent challenging Nebraska's statutory provisions on grounds that they are inconsistent with the procedural protections set forth in P.L. 94-142 (20 U.S.C. §§1401 *et seq*.). Plaintiffs allege they are denied impartial due process hearings as required by 20 U.S.C. §1415 due to a state statute which empowers the State Commissioner of Education to review decisions made in due process hearings. One plaintiff had been denied relief following full administrative hearings, including review by the Commissioner; another plaintiff never sought administrative review of his case due to his belief that he couldn't receive an impartial hearing under Nebraska's law. *Rulings* (in granting preliminary injunctive relief): (1) Although plaintiffs seek to represent the interests of a class, since no class certification motion has been filed,preliminary relief is denied to the extent it would protect persons not named as individual plaintiffs. (p.1080) (2) P.L. 94-142 "creates a federal cause of action which is not restricted by any federal statute of limitations," thereby requiring the court to apply the most analogous state statute of limitations. (p.1083) (3) Although the procedure for identifying this analogous state statute is not uniform, two factors are often considered; whether the allegations in plaintiff's complaint state a cause of action under state law and, then, whether the judicial proceedings which would be available in state court are equivalent to the federal judicial proceedings available to someone asserting the federal claim. (pp. 1083-84). (4) Under Nebraska statutes, a plaintiff seeking judicial review of a special education administrative hearing is not entitled to *de novo* review and independent factual findings made by the reviewing court but only to a determination of whether the agency decision is based on substantial evidence or is arbitrary and capricious. (p.1084) (5) Under federal laws, 20 U.S.C. §1415(e)(2), a plaintiff seeking judicial review is entitled a *de novo* review in which the reviewing court makes an independent decision based on a preponderence of all the evidence. This makes a suit under §1415(e)(2) "practically indistinguishable from the normal civil action in which all of the issues of the case are tried *de novo*." (p. 1084) (6) With different policy interests involved, "state statutes of limitations designed to govern judicial proceedings in which the court merely reviews the administrative record to determine if the agency decision is supported by substantial evidence should not be applied to federal proceedings in which the court is empowered to make an independent determination based on evidence not found in the administrative record." (p. 1085) (7) One of the purposes of P.L. 94-142, insuring appropriate placement due to accurate evaluations, will not be served if a parent is only given thirty days, as was the case under the Nebraska statute, to determine whether to seek judicial review. (p. 1085) (8) Federal law takes precedent over conflicting state laws concerning rights to impartial due process hearings. (p. 1086) (9) Generally, a party seeking to assert federal jurisdiction under 20 U.S.C. §1415 must first exhaust the state's administrative procedures; however,exhaustion is not required where it would be futile. Futility is a factor here since a claim about the appropriateness of due process procedures cannot be resolved in the due process hearings themselves, since the persons conducting the hearings are without authority to ignore the procedures specifically mandated by state law. (p. 1086) (10) *Pullman*-type abstention (see 312 U.S. 496)(1941) is not applicable in this case since the case involves construction of the federal statute rather than construction of a state statute and, once the federal statute's meaning has been determined, application of the Supremacy Clause presents no abstention problem. (p. 1087) (11) In addition, abstention is not appropriate since there is no reasonable interpretation of the state statute which would reconcile the federal and state procedures. (p. 1089) (12) Any grant of discretionary authority to the State Commissioner of Education to review hearing officer's decision inavoidably conflicts with federally mandated procedures. (p. 1087) (13) Section 1415(e)(3) of the Act, which provides that a student shall remain in the then current educational placement pending the outcome of all proceedings regarding a special education complaint, functions "like an automatic preliminary injunction which maintains the child's then current educational placement. However, unlike a preliminary injunction, the statute replaces 'the Court's discretionary consideration of irreparable harm and likelihood of success on the merits with an absolute rule in favor of the status quo' (citing Gargani v. The School Committee of Cranston, No. 77-0612 (D.R.I. May 4, 1978). The Court is therefore without the power to place a child in any provisional placement except for his then current educational placement." (p. 1088) (14) Therefore, to the extent that plaintiffs seek an interim placement other than the then current educational placement at the time of the complaint, the request is denied. (p. 1088). (15) Normally, the "then current placement" for purposes of §1415(e)(3) is determined at the time a complaint is submitted to the local school district, since such a complaint would be the beginning of an administrative proceeding. However, the student is in an interim placement agreed to by the parents, that placement is the "then current placement" under §1415(e)(3). (p. 1089) (16) The requirement that a student remain in his/her current educational placement pending the outcome of complaint proceedings means neither party may unilaterally change that placement and that where the school was paying the costs of placement, it must continue to do so. (p. 1089) (17) Where a school district refuses to pay the costs of an educational placement when it has previously paid such costs, the district has instituted a change in placement. (p. 1089) (18) Nebraska statute providing for review of state special education hearing officer's decisions by the state commissioner of education conflicts with the federal requirement that the decision made in the due process hearing shall be final except for judicial review. 20 U.S.C. §1415(e)(1). (p. 1091). (19) To interpret the state statutory provision otherwise would be inconsistent with the plain language of the statute and is not fully sponsored by the legislative history of that statute. (p. 1092) (20) The provision in 20 U.S.C. §1415(e)(2) that a court "shall grant all appropriate relief" in instances of violations of P.L. 94-142 and the legislative history of the statute strongly suggest that a court may award damages under the Act when such relief is deemed appropriate. (p. 1094) (21) Recovery of costs of tuition paid may also further the purpose of P.L. 94-142 (p.1094) (22) Time spent in an inappropriate placement which does not further the education progress of a handicapped student cannot be compensated for by monetary damages and amounts to irreparable harm. (p. 1094) (22) Although one plaintiff has been denied an impartial hearing, it is not appropriate for the court, as requested, to appoint an impartial hearing officer; instead the State Commissioner of Education is ordered to make such appointment but to abstain from conducting any review of that officer's decision. (p. 1095).

Moran v. Board of Directors, School District of Kansas City,
584 S.W.2d 154 (Missouri Ct. of Appeals, W.D., 1979)

Appeal of a judgment which granted parents of an educable mentally retarded child the cost of services for their child at a private institution. Respondents allege that their child was in need of private school placement and therefore removed her from public school placement, placing her in a private segregated special education facility. After a full due process hearing, the hearing officer found that the private school offered little in unique services and that the public school system could provide an appropriate education for respondents' child. Respondents, unsatisfied, petitioned for another administrative review. The subsequent hearing officer affirmed the prior decision and denied relief for the cost of the private school placement. A subsequent judicial action pursuant to §162.670 et seq. R.S.Mo. awarded respondents the cost of child's private placement. The school district therefore brings this appeal contending that "the court exceeded the scope of judicial review of the decision of an administrative agency whose findings and decision were supported by competent and substantial evidence on the record." (p.161) Rulings (in reversing): (1) "The reviewing court may only determine whether the board could reasonably have made its findings and reached its result of whether the decision was clearly contrary to the overwhelming weight of the evidence." See Moore v. Bd. of Ed. of Sp. School Dist., 547 S.W.2d 188 (Mo.App. 1977). (p.161) (2) "It is only where the review does not involve an exercise of administrative discretion, but includes only the application by the agency of the law to the facts, that the court may weigh the evidence for itself and determine the facts accordingly." (p.162) (3) The administrative agency could have reasonably made the indicated findings based on the statements and evidence presented. (p.162) (4) Respondents' child may remain in private placement but the school district need not bear the cost. (p.162) (5) Since respondents' child is offered an appropriate placement in the public schools, failure to bear the cost of her private school placement while paying for the cost of others is not a denial of equal protection. (p.162)

In the Matter of Pautz (Supreme Ct., Minn., 8/8/80)
(Clearinghouse #30,386).

Appeal from administrative and judicial review of dispute concerning appropriateness of I.E.P. and placement recommendation concerning petitioner, a mildly retarded Downs Syndrome child. The initial informal due process hearing resulted in a decision by the hearing officer that the local school district's I.E.P. was sufficient. On appeal, the state commissioner of education determined that the district's proposed I.E.P. was inappropriate and incomplete. The school district appealed to state district court, which reversed the decision of the commissioner and adopted the determination of the local hearing officer. This appeal followed. Rulings (in reversing and remanding):(1) While the role of the district court is to affirm the decisions immediately preceeding its review unless the decision was arbitrary or contrary to the law or the evidence, the commissioner is not so restricted in his/her review. (p.3) (2) "An agency, charged with the responsibility of promulgating and enforcing rules for the uniform implementation of its statutory duties, develops an expertise and experience in that singular area unique to it. For that reason, we have attached a presumption of correctness to agency decisions, and have repeatedly directed courts to show deference to that technical training, education, and expertise." (p.3) (3) To impose the same standard of review on the state commissioner of education as on the local hearing officer is to inappropriately assume that the local hearing officer has developed the same technical training, education, experience as the state education agency. (p.3) (4) "The decision of the hearing officer which arises in a localized context is, if appealed, to be examined by the commissioner in conjunction with the uniform implementation of its rules and furtherance of its policies. Subsequent district court review must be predicated upon the presumption of correctness attached to that agency decision." (p.4) (5) "Our independent evaluation of the record and decision of the agency further requires the conclusion that the commissioner was correct in its determination that the I.E.P. was inadequate and incomplete" and that the commissioner did not exceed or violate constitutional or statutory requirements. (p.4)

Pushkin v. Regents of University of Colorado, 504 F.Supp. 1292 (D.Colo. 1981).

Action by medical doctor seeking injunctive relief and damages for defendants' alleged refusal to admit plaintiff to their psychiatric residency program solely on the basis of his multiple sclerosis, a handicapping condition. Defendants allege, however, that plaintiff was not admitted into the program because his interview ratings were far below those of other persons accepted into the program. The defendants' admission policy for applicants was not based on academic record or scholastic aptitude tests but rather on results obtained from personal interviews with faculty members. The court found as a matter of fact that because of plaintiff's handicap, the educational interview process in regards to the plaintiff was distorted. Rather than considering plaintiff's candidacy the interview turned into a "faculty introspection." The primary contention of the four interviewing doctors was that plaintiff could not deal emotionally with potential patient reaction to his disability. Plaintiff brings this action pursuant to Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and 42 U.S.C. §1983. Rulings (in finding for plaintiff): (1) While the non-exclusive use of subjective criteria in the educational setting is clearly a permissible means of determining admissibility of students, in the instant case there is no established criteria upon which subjective assessment can be based. (p.1298). (2) Good faith does not constitute a defense to discrimination against the handicapped. (p.1299) (3) Defendants did not act in bad faith. (p.1299) (4) Plaintiff has established that he is a qualified handicapped person for the residency. (p.1299) (5) Plaintiff has established that the sole reason for his exclusion from the program was his handicap. (p.1299) (6) The court is not determining whether plaintiff was one of the best qualified for a position in the program, rather he did not receive the same consideration as other applicants and he was treated differently because of his handicap. This is the sort of discrimination which Section 504 prohibits. (p.1299) (7) Plaintiff has not met his burden of proof concerning monetary damages but he is entitled to an award of costs including attorney fees. (p.1300) (8) Defendants shall admit plaintiff to the next ensuing class in the psychiatric residency program in question. (p.1300).

School Committee, Town of Truro v. Commonwealth of Massachusetts, Department of Education, Division of Special Education, Bureau of Education Appeals, Mass. Superior Court, Rulings and Order, 6/27/80, 3 EHLR 552:186.

Action by the school committee of the town of Truro seeking declaratory relief concerning the rights of a handicapped child who, for four and a half years, had been receiving psychological counseling by a particular psychologist but in a new program for the 1979-80 school year was denied services by that counselor and given the services of another in her place. The parent of the child alleges that during the four and a half year period a professional relationship of rapport and confidence was built up between the child and his mother and this particular psychologist. Due to financial reasons, the school's new program included three counseling alternatives, none of which were the child's present counselor. The parents rejected the change in counselors which was proposed by the new program. An adjudicary hearing was held by the Bureau of Special Education Appeals which upheld the parent's position. The LEA then filed a petition for review and declaratory relief. The question presented to the court is whether under G.L. c.30A §14(7), the decision being reviewed is supported by substantial evidence and is free from error of law. Rulings (in affirming): (1) "It is the obligation of the Court to affirm the decision if there is substantial evidence in the record to support it." (p.552:186) (2) "The record shows that there was overwhelming support for the hearing officer's finding that the counseling component of the individual education program proposed by Truro was not adequate or appropriate to meet the special needs and that continued counseling by Mrs. Rosenberg was necessary to make such program adequate and appropriate." (p.552:186) (3) This case is similar to Amherst-Pelham Regional School Committee v. Department of Education, Mass. Adv. Sh. (1978) 2673 in which the Court held, ". . .the bureau may recommend a specific alternative placement. . .Moreover, once the bureau has found a school committee proposal inadequate and has recommended an alternative to which the parents agrees, the statute neither requires nor suggests further school committee input in the decision-making process." (p.552:187)

See Frankel §140A; Frederick L. §140B; Isgur §140B; Larry P. §140B; Levy §140B; Upshur §140B; Lora §140C.1; New York A.R.C. §140C.1; Anderson §140C.2; Fitz §140C.2; Laura M. §140C.2; Rowley §140C.2; In the Matter of the "A" Family §140C.6; Univ. Texas §140C.6; Levy §140D; Lombardi §140D; New Mexico A.R.C. §140D; Campochiaro §140E; Grymes §140E; Stemple §140E; Sherer §140F.2.

140F.4 Right to compensatory/punitive damages

In the Matter of David Cloud, File No. 87399, Hennepin County District Court, Juvenile Division, Dist. 4, Findings and Order, 2/28/77 (Clearinghouse #18,666B)

Ruling on damages for school suspension found by court to violate Minnesota Fair Dismissal Act. The pupil was denied "for a period of some weeks" an education, "the companionship of other, similar youths...", and "the special training and counselling of the staff of the school which had expertise in working with his particular disability." The pupil "offered neither evidence nor method of affixing a particular dollar figure to any particular element of damage." Rulings: (1) As the "violation [of the law] was not wilful," punitive damages are not warranted. (2) "Compensatory damages are grossly determined in the amount of $500.00..." to be paid by the system to the pupil. (3) While plaintiff's counsel may have performed services of a value of $10,000, in order to avoid filling the courts with "six-penny cases", the court "adopts as a rule that it will not authorize attorney fees of more than twice the compensatory damages;..." Attorney fees of $1,000 are awarded. "No method of ascertaining attorney fees was proffered."

Lantzer v. Clark, Civil No. 79-038 , Motion for Partial Summary Judgment, 12/13/79, Affidavit of C. Sue Lantzer, 12/12/79, Memorandum in Support of Motion for Partial Summary Judgment, 12/13/79. Answers to Plaintiffs' Interrogatories and Request for Admissions, Order Granting in Part and Denying in Part Cross Motions for Summary Judgment 1/14/80 (D.Hawaii).

Action brought by a multiply handicapped, epileptic seven-year-old child for failure by defendant Department of Education and its employees to develop an Individualized Education Program (I.E.P.) as required by Section 504 of the Rehabilitation Act of 1973 and P.L. 94-142, (20 U.S.C. §1401 et seq.). Plaintiff was offered orally four different school placements and three different programs. No I.E.P. was prepared for any of these placements, leaving plaintiff's mother confused as to what placement would entitle. Plaintiffs seek summary judgment requiring defendants to reimburse them for the costs of child's private schooling and enjoin defendant from failing to provide plaintiff with a free appropriate public education caused by failure to provide a written I.E.P. Defendants argue that federal judicial review is not appropriate since plaintiffs did not timely appeal a hearing officer's determination that their son was receiving appropriate education. Rulings (granting in part and denying in part motions for summary judgment): (1) Plaintiff was denied a free appropriate public education because he was not given a written I.E.P. (p.1) (2) Since the hearing officer's decision that an appropriate education was being offered was so clearly wrong, since there was no I.E.P., the court could never find there was a full and fair hearing with a res judicata effect. (p.2) (3) "The conclusion is inescapable that if damages are otherwise recoverable, they may be recovered for Timothy's first year's tuition." (p.2) (4) It is not clear whether damages may be awarded against a state official in his official capacity pursuant to a §1983 action or Section 504 and P.L. 94-142. (pp.2-3)

Loughran v. Flanders, 470 F.Supp. 110 (D.Conn. 1979)

Action is brought pursuant to P.L. 94-142, 20 U.S.C. §§1401 et seq., seeking alternative educational relief and one million dollars in damages to compensate for the emotional trauma suffered due to defendants' actions in allegedly failing to adequately evaluate and provide an appropriate individualized education for plaintiff. Rulings (in granting defendants' motion to dismiss the damage claim): (1) There is no need to exhaust administrative remedies as defendant contends "since the state procedure has no relevance to the question of whether there is a private remedy for damages implicit in the provisions of 20 U.S.C. §1400 et seq." (p.113) (2) P.L. 94-142, 20 U.S.C. §1415(e)(2), affords only limited jurisdiction to federal courts to review claims alleging errors in the evaluation or placement of the handicapped or denial of the Act's procedural safeguards. (p.113) (3) Plaintiffs' case does not satisfy the standard for determining whether a private damage remedy is implicit in a statute not expressly providing for one enunciated in Cort v. Ash, 422 U.S. 66 (1975): (a) plaintiff is one of the class for whose special benefit the P.L. 94-142 was enacted; (b) "the legislative histories of these Acts (P.L. 94-142, P.L. 93-380, P.L. 94-14)[are] devoid of even the slightest suggestion that Congress intended for it to serve as a vehicle through which to initiate a private cause of action for damages." (p.114); (c) the case of action of damages is not consistent with the legislative scheme of the statute; "recognition of a private remedy for damages would compel these programs to shift their focus. Insulation of school officials from liability would take precedence over the implementation of inactive educational reforms." (p.115); (d) "the purported cause of action (essentially alleging plaintiff is the victim of educational malpractice) is one traditionally relegated to state law, in an area basically the concern of the states." (p.115)

Miener v. Missouri, No. 79-1050 C(2) (E.D.Mo. 1/25/80),
3 EHLR 551:512 (1980).

Action by a 17 year-old handicapped girl alleging defendants were discriminating against her because of her physical and emotional disorders and failing to provide her with a free appropriate public education at the state hospital where she was a resident. Action brought pursuant to P.L. 94-142 (20 U.S.C. §1401 et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), and 42 U.S.C. §1983. Defendants have made a motion to dismiss on several grounds including their claim that Section 504 may not be utilized to support a private right of action for equitable relief and/or damages. Rulings (in granting in part and denying in part motions to dismiss): (1) Prior to the adoption of H.E.W.'s regulations promulgated under Section 504 it was generally held that Section 504 could be enforced through a private cause of action, (p.551:513) See Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977), United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977), and Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir.) (2) With the adoption of the implementing regulations the holdings of these cases have become uncertain. (p.551:513) (3) The decision in Cannon v. University of Chicago, 99 S.Ct. 1946 (1979) concerning Title IX (non-discrimination in education on the basis of sex. 20 U.S.C. §§1681 et seq.) is applicable to the private cause of action issues concerning Section 504. In Cannon the Supreme Court held that "despite the absence of any express authorization in Title IX for the maintenance of a private cause of action to enforce that Title, such a cause of action should be implied." (p.551:513) (4) Since "Complaints under all three statutes [Title VI, Title IX and Section 504] are administratively handled through the same procedures and regulations, 45 C.F.R. §§80.6 through 80.11; 45 C.F.R. part 81; 45 C.F.R. §84.61; 45 C.F.R. §86.71. . .[T]his Court must conclude that the implication of a private right of action to enforce Title IX without prior resort to administrative procedures mandates a similar conclusion with respect to Section 504." (p.551:514) (5) Determination of whether a private cause of action should be implied under Section 504 should be guided by the factors set forth in Cort v. Ash, 422 U.S. 66 (1975). (p.551:514) (6) The existence of the right to a private cause of action does not mean the legislative intent was to create a private damage suit. (p.551:514) (7) "The power to enforce the statute's (Section 504) nondiscriminatory mandate through fiscal pressures, however, is best left to the appropriate governmental agency, which is better able to determine whether an illegal discriminator deserves the cut-off of federal funds." (p.551:514) (8) If a party is allowed to enforce a private damage suit, the recipient of federal funds against whom he is suing might decide to relinquish federal assistance if the liability approaches or exceeds the funds received, and thereby be free to discriminate against whomever he wishes. (p.551:514) (9) Defendants' motion to dismiss plaintiff's claim for damages should be granted. (p.551:514) (10) A course of action under 42 U.S.C. §1983 has not been stated. The allegations of discrimination based on handicap are covered by Section 504 and not the Constitution. (p.551:514) (11) A private cause of action for damages cannot be implied under P.L. 94-142. (p.551:514)

Patton v. Dumpson, 425 F.Supp. 621 (S.D.N.Y.,1977);
75 Civ.4922 (S.D.N.Y. 1980), 48 U.S.L.W. 2523, 3 EHLR 551:526.

Action for damages on behalf of an abandoned physically and mentally handicapped child against the executive heads of private and public welfare agencies who were responsible for his care but failed to provide him with an adequate education due to his handicap. Plaintiffs have named as defendants individuals, in their individual and official capacities, rather than their agencies. On a court-ordered motion to dismiss two issues are present: whether a private right of action for damages exists under §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) and whether the doctrine of respondeat superior can be applied to this case. This action is brought solely under Section 504 of the Rehabilitation Act of 1973, as all other claims were dismissed previously and plaintiff's counsel concedes there is insufficient evidence of defendants' personal responsibility to prevail in a §1983 action. Rulings (It would be inconsistent to deny a private cause of action under §504 when the statute parallels Title IX (42 U.S.C. §§1631 et seq.) and a private cause of action has been recognized there (citing Cannon v.

University of Chicago, 99 S.Ct. 1946 (1979).(p.551:528) (2) There is "no precedent for limiting a private right of action under §504 to suits for injunctive relief in the absence of a Congressional directive to that effect and where money damages for civil rights violations is a well-recognized practice. (p.551:528) (3) "The history of implied rights of action under statutes other than §504 does not reveal a judicial preference for equitable as opposed to legal remedies." (p.551:528) (4) "Where, as here, money damages are the only means of compensating a victim of past discrimination, that remedy must be available to the plaintiff. Thus, absent an expression of congressional intent to the contrary, private actions under §504 cannot be limited to suits for equitable relief." (p.551:529) (5) With unsettled case law on the issue of the need to exhaust administrative remedies, the views of the responsible administrative agency are entitled to an even greater weight than usual. That agency, H.E.W., contends that exhaustion should not be required. (p.551:529) (6) "The administrative enforcement regulations promulgated under §504 are not adequate to protect the personal rights of individual victims of discrimination. . .[as] the sole administrative remedy for a violation of §504 is a termination of federal funds to the offending agency." Since the administrative remedy of terminating funding provides no redress for the individual who has been discriminated against, exhaustion is not required. (p.551:530) (6) The Congressional intent of §504 appears to be that the judiciary should use all available tools to prevent discrimination against the handicapped in federally funded programs. Therefore "the application of respondeat superior to §504 suits would be entirely consistent with the policy of that statute" and the general rule (distinguishing Monell v. Dept. of Social Services, 436 U.S. 658 (1978). (p.551:531) (7) However, while municipal agencies and their officers are the same for purposes of suit by or against one of them, a private agency and its offices are distinguishable. A private agency cannot be sued by naming its officers as defendants; respondeat superior therefore does not apply. Therefore, action may proceed against municipal defendants but is dismissed against the head of the private social service agency. (p.551:532).

Stubbs v. Kline, 436 F.Supp. 110 (W.D.Pa. 1978)

Action by handicapped child and his mother against state and local educational officials for failure to provide plaintiff with a free appropriate education. Plaintiff alleges that he was unlawfully excluded from the school he was attending where upon the defendant school district recommended assignment at the Home for Crippled Children, No interim placement was made for plaintiff nor was an I.E.P. developed. Plaintiff's mother therefore requested a due process hearing pursuant to 20 U.S.C. §1415(b)(2). The decision rendered required placement of plaintiff in the Home for Crippled Children as soon as possible, interim placement, and development of an I.E.P. Plaintiff was not placed at the Home for Crippled Children until May 1, 1978 although state defendants had knowledge that the plaintiff was not receiving an appropriate education as early as September 1977. Plaintiffs bring action pursuant to P.L. 94-142 (20 U.S.C. §§1401 et seq.) and Section 504 of the Rehabilitation Act of 1973, specifically alleging that plaintiff was excluded without notice as required by state law; that the local school district, the intermediate educational unit, and the Home for Crippled Children failed to provide an I.E.P. for plaintiff; that the Department of Education scheduled the due process hearing beyond the time limit set by Pennsylvania law; that the officers of the Commonwealth were aware of plaintiff's situation but failed to respond for eight months. Rulings (in granting in part and denying in part motions to dismiss): (1) The court lacks subject matter jurisdiction under P.L. 94-142 as plaintiffs were afforded a due process hearing and received a favorable determination from that hearing. 20 U.S.C. §1415(e)(1) provides that jurisdiction extends only to appeals from decisions rendered at the due process hearing. As plaintiffs are certainly not appealing determination of that hearing, which was favorable to them, there are no grounds for jurisdiction. (p.114) (2) "The Commonwealth agencies are immune from suit. . .unless the state has waived its Eleventh Amendment immunity." (p.114) (3) "However, the Eleventh Amendment is no impediment to a damage suit against state officials in their individual capacities." (p.115) (4) The officers of the Commonwealth did not grossly abuse their powers to such an extent as to be held liable in their individual capacities. (p.115) (5) Plaintiffs have stated a cause of action pursuant to Section 504 (p.115) (6) However, since the Rehabilitation Act of 1973 does not contain explicit authorization to enable individuals to bring suits against states, the Eleventh Amendment is a bar to a Section 504 action against the Commonwealth defendants. (p.116) (7) Pursuant to the doctrine of primary jurisdiction this case is stayed and remanded to H.E.W. for an administrative hearing. The doctrine of primary jurisdiction requires a court to refer a matter to an administrative agency for resolution "even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are beyond the court's ordinary competency and within the agency's particular field of expertise." Pursuant to 45 C.F.R. §80.7 any person claiming discrimination may file a complaint with H.E.W., after which an investigation and hearing is conducted. Plaintiff must therefore pursue this course of action before bringing an action in court. (pp.116-117). (8) This case is stayed and remanded to H.E.W. for consideration without regard to the 180 day limitation appearing at 45 C.F.R. §80.7(b). (p.117)

See Hoffman §5.5; Riley §140B; Anderson §140C.2; Campbell §140C.2; Howard S. §140C.2; Lopez §140C.2; M.R. §140C.2; Doe v. Koger §140C.4; Donnie R. §140C.4; Boxall §140D; Elliot §140D; Henkin §140D; Oster §140D; Grymes §140E; Stemple §140E; Sherer §140F.2; Harris §140F.3; Monahan §140F.3.

140F.5 Class certification

Armstrong v. *Kline*, C.A. No. 78-172, E.D. Pa., Ruling on Class Certification, 2/2/79

Action seeking provision of continuous educational programming (*i.e.*, in excess of 180 days per year) for special education pupils for whom this is allegedly "appropriate" education, in view of their particular needs. . The complaint is based on 20 U.S.C. §1401 *et seq.* and 29 U.S.C. §794. *Ruling* (in certifying class): The class is composed of: "All handicapped school-aged residents of the Commonwealth of Pennsylvania who require or may require a program of special education and related services in excess of 180 days per year, and the parents or guardians of such persons."

Stuart v. *Nappi*, Civil Action No. B-77-381, D.Conn., Ruling on Motion to Deny Class Certification, 9/5/78 (Clearinghouse #23,220G)

Action on behalf of named plaintiff who alleges denial of appropriate education based upon the school district's failure to evaluate and write an individualized education program for her and the district's attempts to expel her from school (halted by previous temporary restraining order and preliminary injunction). Plaintiff seeks certification of a class composed of students in defendants' high school who receive special education but are not receiving adequate special education. *Rulings* (in denying in part and granting in part): (1) In order to evaluate the class properly, it must be divided into two subclasses, one composed of students who have exhausted their administrative remedies under 20 U.S.C. §1415 and another composed of those who have not. (p. 1) (2) A federal district court does not have jurisdiction over the claims of handicapped students who have not exhausted their administrative remedies. (p. 2) (3) Two possible exceptions to this jurisdictional bar are: (a) where the case presents extraordinary problems such as those which gave rise to the preliminary injunction here, and (b) where the case involves handicapped students never referred for evaluation by the school. (p. 2) (4) "Because students who are never referred [for an evaluation] are often not aware of their rights under the Handicapped Act, they cannot be expected to exhaust their administrative remedies. Therefore, it would seem that a class consisting of handicapped students that have never been referred [for an evaluation] could be certified as a Rule 23(b)(2) class despite the exhaustion requirement." (p. 3) (5) Because plaintiff's complaint does not challenge defendant school district's practice for referring students for evaluation, plaintiff may not sue on behalf of students who have not been so referred since her claims are not typical of that class. (p. 3) (6) Students who have been referred and labeled as handicapped cannot be grouped in the same class as those who are handicapped but have never been referred for an evaluation because neither injunctive nor declaratory relief is appropriate with respect to the class as a whole. (p. 4)

Tyrone P. v. Maschmeyer, Civil Action No. S77-98C,
E.D.Mo., S.E. Div., Order, 8/29/78

Class action seeking declaratory and injunctive relief and damages against defendant school district and school officials. Plaintiff alleges that disciplinary suspensions and expulsions are imposed without adequate procedural due process; that school discipline is imposed in a racially disproportionate manner; that Missouri statutes, RSMo. §§162.261 and 171.011, concerning expulsion and suspension are unconstitutional; and that the school district fails to evaluate for ascertainable handicaps and to provide free and appropriate public education for handicapped children prior to exclusion from school for disciplinary reasons. Action is brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794; P.L. 94-142; the Education for All Handicapped Children Act, 20 U.S.C. §§1401 *et seq*.; and Title VI 42 U.S.C. §§2000d *et seq*. Rulings (denying class certification and dismissing claims concerning the handicapped): (1) Plaintiff cannot represent a class composed both of students expelled and students suspended since "constitutional due process requirements for suspending school children differ enough from the requirements for expulsion as to warrant separate treatment." (p. 2) (2) Plaintiff is not learning disabled. Therefore. he is not an adequate representative of the subclass of handicapped students excluded from school. Also, plaintiff's third claim for relief under federal handicapped statutes is dismissed. (p. 3) (3) As to plaintiff's constitutional challenge to the state discipline statutes, no class certification is needed. (pp. 4-5) (4) Plaintiff's claims concerning due process and racial discrimination are not appropriate for class certification since joinder is not impracticable and plaintiff's claims are not typical. (pp. 3-4) (5) Plaintiff is not an adequate class representative because of the absence of an aggressive style of prosecution exhibited by the fact that there was a four month delay between when he was last denied readmission to school and when he filed his complaint. (p. 4)

See Jose P. §110; Mattie T. §140B; Riley §140B; Concerned Parents §140C.1; Matter of Cordero §140C.2; Pehowski §140C.2; Doe v. Koger §140C.4, Georgia A.R.C. §140C.5; Tina A. §140E; United Cerebral Palsy §140F.1, Harris §140F.3.

140G Accessibility

Cardozo Caucus for the Rights of the Disabled v. Yeshiva University, Civil No. 79 CIV 2181 (LBS)(S.D.N.Y. 8/21/79)
Clearinghouse #27,817

Two student organizations and two individual named plaintiffs sue Yeshiva University, its officials, and two of its graduate programs, alleging denial of "physical accessibility" because certain facilities at the law school do not conform to §504 (29 U.S.C. §§701 et seq.) regulations. Rulings (in dismissing against the individual defendants in their personal capacities but denying in all other respects defendants' motion to dismiss): (1) The plaintiff organizations have the requisite standing to represent their members since they allege that their members, or any one of them, are suffering immediate or threatened injury. (p.3) (2) There is no merit to the argument that organization lacks standing because the action was filed as a class action and individual aggrieved persons are also named as plaintiffs. (p.3) (3) "Because defendants in the instant action do not allege a conflict between the two groups of plaintiffs, we similarly conclude that the class allegation in the complaint does not alter our finding that the organization plaintiffs have standing." (p.4) (4) Under Fed. Rule Civ. P. 17(b)(1), an unincorporated association may sue in its common name in federal court, although it has no such capacity under the law of the state, if the suit is for the purpose of enforcing a substantive right existing under the Constitution or federal law. (p.5) (5) Section 504 does create a private cause of action, but not against educational officials in their individual capacities since there is no allegation that defendants were responsible for in anyway other than in their official capacities for the action about which they complain. (p.6) (6) Whether individual damages may be recovered under Section 504 was left open by the Supreme Court in Southeastern Community College v. Davis, 99 S.Ct. 2361 (1970)(See Bulletin, p.422, 722,) However, the issue of damages is best left open until liability is determined. (pp.6-7)

155. Student Records

See In re Mrs. H. §140C.4.

175. Student Rights/Procedural Due Process

See S-1 §140C.4; Vogel §140E; Bobbi J. §175C.

175A. Notice/Right to a Hearing, Nature of Hearing

See Isgur §140B; North Carolina A.R.C. §140B; Seaman §140B; DeNunzio §140C.2; Mason §140C.2; Blue §140C.4; Doe v. Maher §140C.4; Laster §140C.4; Gargani §140D; Grynes §140D; Johnson §140D; Plitt §140D; Concerned Parents §140E; Grymes §140E; Menegas §140E; Robert M. §140E; Tina A. §140E; Victoria L. §140E; Monahan §140F.3; Matter of Pautz §140F.3.

175B. Impartial Decision Maker

See Vogel §140E.

175C. Remedies

Bobbi Jean M. v. Wyoming Valley West School District, Civil No. 79-576, Complaint (Clearinghouse #30,528A), Consent Decree (11/1/80, M.D.Pa.)(Clearinghouse #30,528B)

Class action on behalf of seventh through twelfth grade students excluded from school for more than ten days for disciplinary reasons. Plaintiffs alleged deprivation of constitutional due process rights in that the district imposed harsh and illogical exclusionary penalties on students who committed minor infractions of school rules, excluded students without affording necessary procedural due process safeguards, and excluded students without first providing supportive services designed to prevent exclusion from a free public education. Provisions of consent decree: (1) When faced with problems of student behavior, the district will provide alternatives to exclusion from school without regard to the school budget and/or grants received. (p.1) (2) Prior to holding a hearing which could result in an exclusion of more than ten school days, the district shall provide the pupil with alternatives to exclusion including, but not limited to: a conference between teachers, the student, and the parent or guardian and/or a conference with the principal. If the problem cannot be resolved, the principal may refer the family to a social service agency dealing with family problems; adjust the student's class schedule to minimize the student's contact with a teacher with whom s/he has difficulty; set up an alternative education program for the student; or, pursuant to state and federal laws, refer the student for an evaluation to determine whether the student is a handicapped person in need of special education. (pp.3-5) (3) In all cases where an exclusion of more than ten days is to occur, regardless of whether the above methods have been attempted and have failed, the district shall initiate a review of the case and formulate a service plan with representatives from the county office for Children and Youth Services. (p.5) (4) In the event that a student's behavior problem persists after the above steps have been taken, the district may initiate an exclusion from school for greater than ten days; appropriate notice of the hearing process to consider exclusion is set forth in the decree.(p.6)

185 Substantive Due Process

Board of Education of the Northport-East Northport School District v. Ambach, Index No. 7149-79 (Supreme Ct., Albany Cty., N.Y. 9/18/79)

Action by local school district seeking to permanently enjoin New York Commissioner of Education from enforcing an August 8, 1979 order to the local district or from disciplining the district for failure to follow the order. The state's order requires the district to divulge to the state the names of the two special education students who were issued regular high school diplomas by the district. The state contends that the diplomas were unlawfully issued in fact of a state regulation which requires students to pass minimum competency tests in order to receive a regular high school diploma. The students didn't take the tests or failed the tests due to their handicapping conditions. The district alleges the state order contravenes the state and federal constitutions, state education law, P.L. 94-142 (20 U.S.C. §§1401 et seq.), and §504 of the Rehabilitation Act (29 U.S.C. §794) A motion by the two students to intervene was granted. Rulings (in denying defendants' motion to dismiss and granting a temporary restraining order): "Irreparable harm will result unless enforcement of the order, dated August 8, 1979, is enjoined. If the diplomas are revoked, harm will befall the children to whom they were awarded. The commencement of proceedings [to discipline the local school district]. . .would unduly harm petitioner, its school board members, and the taxpayers of the school district. Delay of enforcement will not harm respondent. The peculiar facts extant herein mandate that the status quo be preserved."

Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D.Pa., 1976)

Challenge to policy of School District of Philadelphia under which blind persons were until 1974 refused consideration for employment as teachers of sighted students. Plaintiff relies upon the equal protection and due process clauses and the Rehabilitation Act of 1973, 20 U.S.C. §794. The court found in part that 400 blind persons are teaching nationally, that many blind teachers can overcome their handicap, and that plaintiff was "evaluated [un]fairly" based upon "misconceptions and stereotypes about the blind," when she applied for a position. A supervising teacher who evaluated plaintiff's student teaching in another system viewed her "minimal success" as resulting only from much extra assistance. Rulings (in granting judgment to plaintiff): (1) "[I]t seems reasonably clear that a refusal to hire a blind person as a teacher is the kind of discrimination against which [29 U.S.C. 794] was meant to prohibit." The statute is not dispositive because it became effective in 1973 while plaintiff first applied in 1969 or earlier. (989) (2) Defendants' policy "created an irrebuttable presumption that blind persons could not be competent teachers" despite evidence that they can be. The court finds a due process violation relying upon Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)(mandatory maternity leave policy invalidated) and distinguishing Weinberger v. Salfi, 422 U.S. 749 (1975)(rule against eligibility for social security payments upheld). The court views the interest at stake as "certainly more important" than the one in Salfi, and the administrative concerns cited in Salfi (need for many hearings) as absent. (989-992) (3) The system's evaluation of plaintiff denied due process and was not consistent with Section 504 of the Rehabilitation Act, 29 U.S.C. 794. The discrimination included not giving plaintiff points for student teaching when she had not been allowed to student teach in the system. (4) Plaintiff must be offered employment as a secondary school English teacher, with full seniority and other benefits accruing to a teacher who commenced employment in 1970. (The issues of back pay and attorney's fees were to be briefed.) (992-993)

Gurmankin v. *Costanzo*, 556 F.2d 184 (C.A. 3, 1977), affirming 411 F.Supp. 982 (E.D.Pa., 1976)(*Bulletin*, p. 289)

Appeal from injunctions ordering defendant school district to employ plaintiff, a blind person, as an English teacher. Defendants appeal, contending that no order should have been entered. Plaintiff appeals, contending that the district court set a seniority date for her which was later than that to which she was entitled. *Rulings* (in affirming): (1) The decision of the U.S. Supreme Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), controls. "The refusals by the District to permit [plaintiff] to take the examination [for employment in the District] violated due process by subjecting Ms. Gurmankin to an irrebutable presumption that her blindness made her incompetent to teach sighted students." (187) (2) "The right to take the examination is a right arising under state law, and its deprivation in an arbitrary manner violated due process." (188) (3) The Court acted appropriately in granting equitable relief which consisted of fixing a retroactive seniority date for plaintiff. (188) (4) The question of whether or not §504 of the Rehabilitation Act of 1973 confers a private right of action need not be addressed here since §504 does not affect the seniority issue. Other courts have, however, found that a private cause of action does exist under §504. (188) (5) the court below did not err in setting the seniority date as of the beginning of the school year after which plaintiff first applied for employment. (188) (6) Defendants' objections to a lower court supplementary order requiring the employment of plaintiff at one of six designated high schools are rejected. The "School Board cannot be heard to claim equities of third parties, particularly when any such equities were created by disobedience of the court's order." (189)

See *Larry P.* §140B; *PASE* §140B; *Halderman* §140C.1; *Lora* §140C.1.

190. Testing

Board of Education of the Northport-East Northport Union Free School District v. *Ambach*, Motion No. 108, (Supreme Ct., Albany Ct., N.Y., 1/23/81)(Clearinghouse #30,936)

Action brought by local school district challenging New York Commissioner of Education's requirement that students pass a minimum competency test in order to receive a regular high school diploma. In defiance of the state regulation, the school district awarded diplomas to two handicapped students who had not passed the test but had successfully completed their I.E.P.s. When the state learned of these diplomas, it issued an order invalidating the diplomas and requiring the district to disclose the names of the students involved. The district refused, and went to court to permanently prevent enforcement of the state order. The two handicapped students intervened in the lawsuit as co-complainants against the New York Comissioner. Action brought under Section 504 (29 U.S.C. §794), P.L. 94-142 (20 U.S.C. §§1401 *et seq.*), 42 U.S.C.

§1983, and state statutes and constitution. Rulings (in granting relief): (1) The state has a legitimate interest in attempting to insure the value of its diplomas and to improve the quality of education provided. Use of minimum competency testing to achieve these goals is appropriate. (p.7) (2) The denial of diplomas to the handicapped students because of their failure to pass the test does not violate §504 of the Rehabilitation Act. That statute requires that a handicapped student be provided with an appropriate education but doesn't guarantee that s/he will successfully achieve the academic level needed to pass the test. (pp. 8-10) (3) Under P.L. 94-142, the state educational agency has the authority to set educational standards regarding appropriate education for the handicapped and the standards set here required passage of a minimum competency test to receive a diploma. (pp. 7-8) (4) P.L.94-142 does not require specific results, but rather the availability of a free appropriate education; the award of a diploma is not a necessary part of a free appropriate public education. (p.9) (5) There is a rational basis for a test-for-diploma requirement and for application of that requirement to handicapped students. (p.13) (6) The diploma represents a liberty and a property interest for the purposes of due process protection. Denial of the diploma would have grave consequences for the employability and future life chances of the students. (p.14) (7) Due to the role of judicial restraint in education matters, the court declines to determine the validity of the test for use with handicapped students. (p.17). (8) The state did fail to provide timely notice of the diploma sanction. There was not sufficient time to structure the student's individual educational programs to prepare them for the test-for-diploma scheme (p.19). (9) Two years of notice on the diploma sanction to the school district is inadequate. No notice at all was given the students of their parents although state special education statutes would require notice. (pp. 19-20) (10) The time frame for notice to handicapped students is much more crucial than for non-handicapped students. Handicapped students require notice of a test-for-diploma scheme sufficiently early to allow the I.E.P. to be written to prepare for the test and to allow appropriate time for instruction to pass the test. (p. 20)

Gary W. v. Louisiana, 437 F.Supp. 1209 (E.D.La., 1976)

Class action, right-to-treatment case on behalf of "all mentally retarded, emotionally disturbed, and other children from Louisiana who have been placed in Texas institutions either by direct action of the State of Louisiana or with financial support from the state." The plaintiff class ranges from normal children abandoned by their parents to those with IQ's under 20. There were, for example, 507 children placed in Texas in 1975. Louisiana public and private facilities do not have adequate space to care for all children considered by the State or parents to require residence outside the home. (This summary focuses on the education aspects of the court's decree.) Rulings: (1) The court enters relief providing, in part, for individualized evaluations and treatment plans for the plaintiff class. (1225-26) "The state is to provide proper care and treatment for the children in the best available environment, wherever it might be located." (1227) (2) "The treatment program for each child shall include a plan for educational services consistent with the child's abilities and needs, taking into account his chronological age, degree of retardation and disabilities or handicaps." (1226) (3) The individualized evaluation of each child shall include "educational... needs...." Evaluation teams shall include "special education teachers...." Periodic reevaluations shall include an "educational...diagnosis...." (1226) (3) "Corporal punishment shall not be permitted....The institution shall prohibit mistreatment, neglect or abuse of any child in any way." (1230) (4) The state shall conform contracts with Texas institutions to the terms of the order. The state shall not contract with facilities which refuse to provide services to black children non-discriminatorily. (1230-31) (5) The court's order also covers: periodic review of the individual treatment plans (1223, 1225, 1231), reports on compliance (1223, 1227), plaintiffs' access to records (1227-28), visitation rights (1224, 1228), mail and telephone privileges (1224, 1228), interaction with the opposite sex (1224, 1228-29), medication (1224, 1229), use of locked rooms and physical restraints (1224, 1229), work by children (1225, 1230), medical treatment (1226), maintenance of records (1227), information to parents (1231), and appointment of case workers (1231).

See Halderman §140C.1.